2013 Administrative Law Judge Training

Sponsor: Missouri Administrative Hearings Commission

March 26 and 27, 2013

Harry S. Truman Building
301 West High St.
Jefferson City, MO 65102

The National Academy for
IDEA Administrative Law Judges and Impartial Hearing Officers Law
Seattle University School of Law

MISSOURI ADMINISTRATIVE HEARING COMMISSION

2013 Administrative Law Judge Training

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Missouri Administrative Hearings Commission Training

Jefferson City, Missouri

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Jim Gerl is a lawyer, a special education law consultant, a trainer of hearing officers and mediators, a hearing officer, a mediator and a lawyer, and he is a frequent speaker on special education law topics. He is special education hearing officer and mediator for the West Virginia, Utah and Pennsylvania. He also was a hearing officer and mediator for special education cases in Washington DC for over two years. Jim serves as a consultant to a number of state education agencies, and he has trained hearing officers from all 50 states. He is also a hearing officer for the West Virginia Division of Rehabilitation, and he is engaged in the practice of law as a partner in the law firm of Scotti & Gerl.

Jim has presented at the hearing officer trainings at several national and regional trainings and at the National Association of Hearing Officials. Jim has served as a Faculty Advisor for the administrative law- fair hearing program offered at the National Judicial College. He has a law degree from the University of San Francisco, a Masters degree in public policy analysis from the University of Illinois- Chicago, and a BA from the University of Illinois at Urbana-Champaign. He is licensed to practice law in West Virginia, Illinois and Washington, DC.

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Cindy Herr is the coordinator of the Middle/Secondary Special Education program and project director for Project PASS (Preparing Autism Specialists for Schools). Herr's areas of teaching and research include special education law, autism, learning disabilities, and teaching methods for students with disabilities at the middle and high school levels. She is also the coordinator of the Middle/Secondary Special Education Teacher Training program at the University of Oregon. Cindy received her B.A. (Psychology) from Gettysburg College and her M.A. and Ph.D. from the University of Oregon.

Among many other publications, Dr. Herr has co-authored (with Barbara Bateman) Better IEP Meetings, Measurable IEP Goals and Objectives, and Writing Measurable Functional Goals and Objectives. She has made presentations to, or participated in workshops for, the Council for Exceptional Children and the Autism Society of America, among others.

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Jose Martin is a founding partner of Richards Lindsay & Martin, whose practice centers on disabilities law issues. In addition to litigation and consultation with public school districts, he has presented at local, regional, state and national in-services, seminars and conferences on special education law. He also serves as Contributing Editor for *The Special Educator*, a weekly newsletter, as well as *Special Ed Connection*, an online subscription publication.

Mr. Martin received his undergraduate and law degrees from the University of Texas at Austin. He previously worked with Henslee, Ryan and Groce, of Austin, Texas, and was employed at the University of Texas School of Law and the Texas Attorney General's Office. He has also authored articles on discipline issues under IDEA and Sec. 504, Sec. 504, OCR and other special education issues.

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Mark C. Weber serves as Vincent DePaul Professor of Law at DePaul University. He is the author of Special Education Law and Litigation Treatise (3d ed. 2008 & supps.), Special Education Law Cases and Materials (with Mawdsley and Redfield) (3d ed. 2010), Disability Harassment (2007), and Understanding Disability Law (2d ed. 2012). In the fall of 2011, he

served as guest editor of the Journal of Law and Education's special issue on the thirtieth anniversary of Board of Education v. Rowley. Before joining the DePaul faculty, he conducted a clinical program at the University of Chicago Law School providing representation for parents of children with disabilities in special education cases.

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Professor Rosenfeld joined the Law School in September 2001. He supervised the Special Education Clinical program and established the National Academy of IDEA Administrative Law Judges and Hearing Officers, which has trained special education hearing officers from over 25 states. In June 2009, he became Director of Education Law Programs. He currently serves as Chair of the Special Education Section of the National Association of Administrative Law Judiciary (NAALJ). Prior to joining the Law School, he founded and, for five years, served as Executive Director of COPAA (The Council of Parent Attorneys and Advocates), a private, non-profit organization established to improve the quality and increase the quantity of legal resources for parents of children with disabilities. In April 2002, he was invited to testify before the President's Commission on Excellence in Special Education, which accepted his proposal to establish a system of arbitration for special education.

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Missouri Office of Administrative Hearing

March 26-27, 2013

An Introduction to the Special Education Process

The Basics: Child Find to Due Process

S. James Rosenfeld March 2013

Objectives of This Presentation

- Origins of special education law
- Overview of basic procedures
- Key concepts and milestones
- Framework for other presentations

Why Special Education Law?

A Brief Look at History

- Education in U.S.: historically state, not federal obligation
- States usually denied education to disabled based on inability to benefit
- *Buck v. Bell*, 274 U.S. 200 (1927), per Holmes:
  "Three generations of imbeciles are enough."
- Expectations of WW2 veterans generated pressure for societal desegregation

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Landmark Case Law

The Judicial Precursors to Legislation

- *Brown v. Board of Education* (1954): Separate settings are inherently unequal
- *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* (1972): Guaranteed educational services on individualized basis for children with mental retardation
- *Mills v. Board of Education of the District of Columbia* (1972): Extended right to educational services to children with ANY disability

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Basic Framework

. . . the Federal-State relationship

- Congress enacted "The Education for All Handicapped Children Act of 1975" (EAHCA), PL 94-142, now called IDEA
  - ✓ Statute = grant in aid ($)+ civil rights
- Compliance with IDEA is "voluntary"
  - ✓ But cf. *NM ARC v. New Mexico*
- Many blanks for states to fill in

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Basic Objectives

. . . the operating principles

- Access: No denial of services because of disability
- Individualization: No "cookie cutter" programming
- Free: Costs cannot be shifted to parents
- Parent Participation: Procedural safeguards

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Current Structure of IDEA

We Concentrate on Parts A & B

- Part A: General Provisions, Definitions and Other Issues
- Part B: Assistance for Education of All Children with Disabilities
- Part C: Infants and Toddlers with Disabilities
- Part D. National Activities to Improve Education of Children with Disabilities

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Key Definitions

34 CFR Subpart A (regulations)

§ 300.8 Child with a disability (compare with §504)
§ 300.17 Free appropriate public education
§ 300.22 Individualized education program
§ 300.34 Related services
§ 300.39 Special education
§ 300.43 Transition services

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Key Concepts
34 CFR Subpart s B-F (regulations)

§§ 300.101 - 102 Free appropriate public education (FAPE)
§§ 300.114 - 118 Least restrictive environment (LRE)
§§ 300.301 - 306 Evaluations
§§ 300.320 - 328 Individualized education programs (IEP)
§§ 300.500 - 518 Procedural safeguards
§§ 300.530 - 536 Discipline procedures

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The Major Procedural Steps
What Can/Does Happen

- Child find/Identification
- Testing and evaluation
- Eligibility
- IEP
- Implementation and periodic review
- Dispute resolution

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Child Find
You can't educate them if you don't know where they are

- Identify and evaluate all children with disabilities in state/district
- Use PSAs, school newsletters, newspaper ads
- Objective: who should be tested for eligibility determination?
- School obligation triggered by "any reason to suspect" disability (private evaluation it knows about)

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Child Find

Which children might need testing?

- Screening used as first step
- Under IDEA, "child with a disability" means:
  - Evaluated per IDEA procedures
  - Has one/more of disabilities defined in statute
  - Needs special education/related services because of disability
- Objective: who should be provided special education and related services?

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Child Find/Identification

The Parameters of Obligation to Serve

- Severability of disability: "zero reject" (*Timothy W.*)
- Location/basic health not barrier
- Behavior: no (special provisions for this)
- "Aging out": beyond age limit set by state law
- Graduation from secondary school
- Need for "education": the educational needs of a child with a disabling condition include **non-academic** as well as academic areas (OSEP 1990)

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Child Find/Identification

What is RTI?

- 2005 IDEA reauthorization: Response to Intervention (RTI)
  - ✓ Can't require severe discrepancy test (ability v. achievement) for SLD
  - ✓ Must permit "process based on child's response to scientific research-based intervention"
  - ✓ Failing grades ≠ existence of disability

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Child Find/Identification

Is there a rush: RTI & formal evaluation

- Dividing line: RTI v. evaluation
  - ✓ Evaluation – when child "suspected of having a disability"
- Key question: how do you determine "when child is suspected of having a disability"
- Parent can request initial evaluation at any time, but LEA conducts it only if it agrees that child may be eligible

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Testing and Evaluation

What, exactly, is the problem?

- No initial provision of services before evaluation
- Purposes of the evaluation
  - Eligibility ($)
  - Nature and extent of **all** needs, not just those linked to primary disability
- Include functional/developmental information re involvement in general curriculum

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Testing and Evaluation

Frequency of evaluation/re-evaluation

- At any time if:
  - School determines it is warranted
  - Parent/teacher requests it
- Not more than once per year unless school/parent agree it is needed
- At least once every three years unless school/parent agree it is unnecessary

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Testing and Evaluation

Notice and consent (§§300.300, 300.503)

- Prior notice to and consent by parent for initial evaluation or initial placement
  - ✓ "Reasonable" efforts to obtain consent required
  - ✓ Different rules for child who is ward of state
  - ✓ School may use dispute resolution procedures where no response
- Notice should be specific
  - ✓ A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action. §300.503(b)(3).

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Testing and Evaluation

Other notice and consent

- Prior parent consent NOT required for:
  - Review of existing data
  - Tests administered to all children (general screenings)
- Parent may refuse consent to specific services
- School may not override lack of consent:
  - student home-schooled
  - privately placed at parent expense

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Testing and Evaluation

Timelines (§300.301)

- Initial evaluation within 60 days from receipt of request
- Timeline inapplicable if:
  - Parent does not produce child
  - Child is subsequently enrolled in another school district and evaluation there will meet timeline

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Testing and Evaluation

Evaluation criteria (cf. *Larry P.*, *PASE*)

- tests/measures administered in child's native language
- valid for the specific purpose used
- administered by trained personnel
- tailored to assess specific areas of educational need
- selected/administered to ensure it measures what it purports to measure
- not used as a single procedure/sole criterion
- assess in all areas of suspected disability

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Testing and Evaluation

Independent Educational Evaluation (§300.502)

- Parents may obtain own evaluation (IEE) at their expense at any time
- Parents may ask school to pay IEE; school must either:
  - ✓ Pay for independent evaluation, OR
  - ✓ File for due process hearing to show its evaluation is appropriate
- School may require same criteria for IEE as used for its own evaluation (qualifications; location)
- IEP team required to "consider" IEE results

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Eligibility Determination

What, who, and how

- What: sets "primary" disability (eligibility) and identifies any other disabilities requiring special education and related services
- Who: one/more qualified professionals and parents
- How: consensus based on evaluation (and "considers" other materials)

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Eligibility Determination

Other factors that may preclude eligibility

- No IDEA eligibility if "determinant factor" is:
  - ✓ Lack of appropriate instruction in reading
  - ✓ Lack of appropriate math instruction
  - ✓ Limited English proficiency
- No IDEA eligibility if child needs only related service (not special education)
  - ✓ Example: child in wheelchair?
  - ✓ "Accommodation" under §504?

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Eligibility Determination

Additional procedures for SLD ("grab-bag")

- More detailed procedures for identification, eligibility for "Specific Learning Disability"
- Existence of SLD (§§300.307, 300.308)
  - ✓ Can't require severe discrepancy
  - ✓ Permit use of RTI
  - ✓ Permit other research-based intervention
- Additional members of eligibility team (§300.308)
- Stricter observation, documentation (§300.310-311)

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Individualized Education Program

Who's involved – IEP team members

- Minimum IEP team members
  - ✓ Parents
  - ✓ At least one regular education teacher
  - ✓ Child's special education teacher
  - ✓ District supervisor
  - ✓ Evaluation "interpreter" (instructional import)
  - ✓ "Other individuals" with knowledge of child
  - ✓ Child (if appropriate)

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Individualized Education Program
Other possible IEP team members

- Related service providers (*e.g.*, transportation)
- Personnel from other agency providers (for transition services)
- Behavior specialists
- Private school representatives
- Interpreters (LEP/deaf)

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Individualized Education Program
IEP attendance not required/excused

- School participant excused if parent/school agree in writing that service is not being modified/discussed
- Parents/school may agree to let school participant submit input in writing

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Individualized Education Program
IEP contents: minimum

- Present levels of performance (PLOPs)
- Special education and related services (SPED & RS), based on peer-reviewed research
- Measurable annual goals
- Why removal from regular class required
- Modifications re state/district-wide assessment
- Term of IEP; frequency, location, duration of RS

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Individualized Education Program

IEP contents: variable

- Transition plan and services (16 and older)
- Assistive technology needs and services
- Extended school year/summer school
- Behavior modification plan
- Language/communication needs (LEP/blind/deaf)

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IEP Meeting Considerations

Where the rubber hits the road

- Schedule: "reasonably convenient"?
- Length: complexity = more time/meetings
- Attendees: necessary personnel
- Draft IEP?

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Related Services

"required to assist a child . . . to benefit from special education"

- Types of services are virtually inexhaustible; regulation is *illustrative*
- May include services to parents
- Includes many services of "medical" nature, depending upon provider
- Services required across entire spectrum of possible educational placements

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Individualized Education Program
Procedural requirements

- Must be developed within 30 calendar days following evaluation
- Should be implemented "as soon as possible"
- Must be reviewed/revised at least annually
- Must be provided to parents, all service providers
- School does not guarantee student will achieve IEP goals, but must make good faith effort

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Individualized Education Program
Here's what we're going to try

- IEP is agreement about student's needs, what program will be provided and how to measure whether it's working
- Criterion for success: is student "making progress," *aka* FAPE
- Process is consensual
- IDEA Regs. §§300.320-300.328

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Educational Placement
Least Restrictive Environment (§300.114)

- Education with children who are nondisabled to the maximum extent appropriate
- Removal "only if the nature or severity of the disability is such that education in regular cases with the use of supplementary aids and services cannot be achieved satisfactorily"

[See diagram of placement process]

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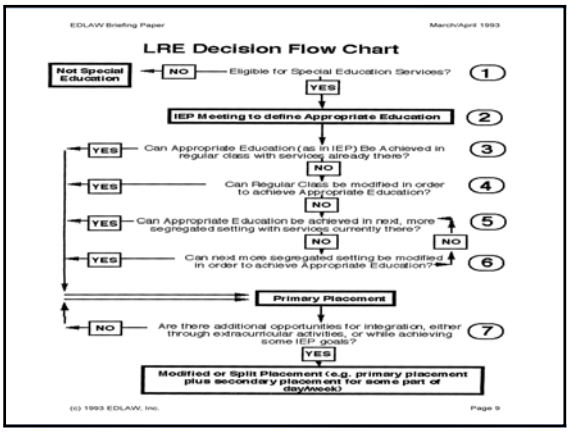

Educational Placement

Least Restrictive Environment (§300.114, *et seq.*)

- Continuum of alternative placements required
  - Regular classes
  - Special classes
  - Special schools
  - Home instruction
  - Instruction in hospitals and institutions
- As close as possible to the child's home
- No removal from regular classroom because of needed modifications in general curriculum

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Educational Placement

Where will child attend school?

- Placement typically made by IEP team
- Must be in "least restrictive environment" (LRE)
  - This does not necessarily mean general education classroom
- Must be "individualized," that is: not "the placement we send all kids with . . ."
- Change from traditional pull-out model of services to the concept of inclusive education

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Dispute Resolution
Mediation (§300.506)

- Paid by SEA and available for any problem
- Must be voluntary
- Conducted by qualified & impartial mediator
  - Must be trained in mediation
- Must offer opportunity to discuss benefits of mediation with "disinterested party"
- Maintain list of qualified mediators

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Due Process Hearings
Can't we all just get along?

- Complaint may be filed regarding any aspect of child's educational program
  - Overwhelming majority filed by parents
- Child's educational placement maintained
- Impartial hearing officer (IHO) holds "trial"
- IHO issues written decision
- Decision is appealable (administrative/civil)

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Due Process Hearings
Post-filing, pre-hearing steps

- Prior Written Notice (§300.508(e)
  - ✓ LEA has opportunity to cure violation of §300.503
- Sufficiency Motion (§300.508(d))
  - ✓ Does complaint adequately describe problem or remedy?
- Resolution Session (§300.510)
  - ✓ Last ditch effort to avoid formal hearing

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Due Process Hearings

Basic hearing rights (§300.512)

- Counsel or person with special knowledge
  - Do you permit lay advocates?
- Present evidence, cross-examine, compel attendance of witnesses
- Five-day disclosure rule ("discovery")
- Written/electronic verbatim record
- Written/electronic decision

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Due Process Hearings

Other procedural considerations

- Hearing closed unless parent opts otherwise
- Hearing reasonably convenient for parents
- Decision required within 45 days of filing
- Extensions for specific periods of time by IHO
- Hearing officer cannot award attorneys' fees
- Appealable to state or federal court

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Discipline: science vs. belief

"We" believe behavior is volitional

- Suspensions for up to 10 school days regardless
- Alternative placement for MORE than 10 school days is considered "change of placement"
  - ✓ Must convene IEP team for manifestation determination and new placement
- Weapons/drugs/infliction of serious bodily harm are different
- "Dangerous" student (likely to result in injury) is different

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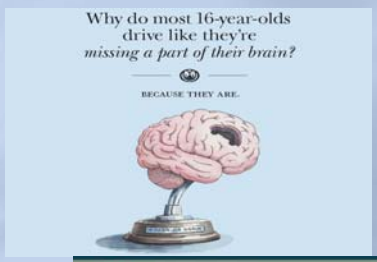
Discipline: science vs. belief

What science tells us



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Areas of Uncertainty/Dispute

Factors that make this difficult

- Lack of agreement among professional educators
  - ✓ Diagnosis of disability (type/extent)
  - ✓ Programming for disability (what works)
- Authority of parents and schools to make decisions
- State-to-state (district-to-district) differences in services

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Areas of Uncertainty/Dispute

What is a "free appropriate public education"?

- What are the possibilities?
  1. Minimum: Education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma.
  2. Maximum: Education that enables child to achieve full potential.
  3. Intermediate: Opportunity to achieve full potential commensurate with opportunity provided to other children.
- *Rowley* decision (USSC, 1982)
  - ✓ Must confer "some educational benefit"
  - ✓ Has the level of FAPE changed? (*Mercer Island*)

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Areas of Uncertainty/Dispute

What is "least restrictive environment" (LRE)?

- "Mainstreaming," inclusion and LRE
  - ✓ General lack of clarity in statute and legislative history
  - ✓ Service availability often trumps restrictiveness
- *Springdale Sch. Dist. No. 50 v. Grace* (8th Cir. 1982)
  - ✓ Did parents prefer more restrictive environment?
- Should there be one definition of LRE?

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Other Logistic Information

Education records; class observation

- Student education records
  - ✓ Access to education records generally
  - ✓ Access to test protocols
- Parent access to school/class
  - ✓ Parent observation of child

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An Overview of the Individuals with Disabilities Education Act[1]

I. Introduction

A. Purpose

1. The purpose of this outline is to provide an overview of the IDEA scheme, a "feel" for how it works (and doesn't work), and insight regarding particular areas where significant substantive issues may arise for in due process hearings.

B. The first basic: the Supremacy Clause

1. Federal law (IDEA, its regulations and USDoEd policy) prevails whenever they conflict with the state law/district policy if compliance with both is impossible, or where the state law/district policy (including collective bargaining agreements) is an obstacle to the accomplishment/execution of the purposes/objectives of IDEA. *Pacific Gas & Electric v. State Energy Resource Conservation & Dev Comm*, 461 U.S. 190, 203-04 (1983). See for example *Vogel v. School Board of Montrose R-14 School District*, 491 F. Supp. 989, 552 IDELR 202 (W.D. Mo. 1980).
2. This may appear to be a "no brainer" principle of Constitutional and administrative law, but it is startling how often it is either unknown to, ignored or disregarded by education agencies and their counsel.

C. The second basic: check all sources of law

1. The sources of special education law are exceedingly complex, as is illustrated by the accompanying chart on page 4.
   a) Federal statute
   b) Federal regulations
   c) Federal agency interpretations
   d) State statute
   e) State regulations
   f) State agency interpretations
   g) State hearing decisions
   h) Federal judicial decisions
   i) State judicial decisions
2. You must have some basic understanding of administrative law to be able to reconcile the various sources of law.

[1] Citations to 14xx are to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, et seq. Citations to 34 CFR 300.xxx are to Parts A and B of the Federal regulations implementing IDEA; however, these regulations were revised in mid-August, 2006, so it is important to check the new regulations for any changes.

3. You must consult more than "online" sources to competently research special education law, e.g. "IDELR," the Individuals with Disabilities Education Law Report, available in the Library.

D. The third basic: education is the most political and hypocritical activity of our society

1. Never underestimate the impact of politics, and all politics is local.
2. School boards are the most dysfunctional political organ of our society.
3. Few people really believe that "Children are our future."

E. The fourth basic: all eligible children are entilted to a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE)

1. "Free appropriate public education" is defined as special education or related services that:
   a) are provided at public expense;
   b) meet the standards of the state;
   c) include preschool, elementary school, or secondary school (i.e., not post-secondary) and
   d) are provided in conformity with an IEP, meeting the requirements of 34 CFR 300.340-350. See 34 CFR 300.13.
2. Seminal case in defining "FAPE" was Supreme Court's decision in *Board of Education of the Hendrik Hudson School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (U.S. Sup. Ct 1982). Finding that Congress intended IDEA to provide "equal educational opportunity," *e.g*, "access," the Court rejected arguments that appropriate meant some maximization of potential or commensurate opportunity. Court said it was not attempting to establish any one test for determining the adequacy of educational benefits IDEA required, stating that an IEP, the "keystone" of the child's program and IDEA:
   a) had to be formulated in accordance with the procedural requirements of the Act; and
   b) must be "reasonably calculated" to enable the child to obtain educational benefit. For some, it said yearly advancement from grade to grade would be an important factor.
3. The Court emphasized the primary responsibility for formulating the educational methodologies under IDEA was left to state and local officials in cooperation with the parents. Accordingly, lower courts should not impose their views of preferable educational methods upon states.
4. Although *Rowley* involved student with hearing impairment who performed above average of her class, and Court advised that it was not establishing FAPE standard for all students, Rowley has become initial reference point for determining FAPE, if not the "gold standard."

5. Differences have continued concerning precise meaning and application of "least restrictive environment,"in part because of a lack of definition in the law (see page 4, below).

   a) *Quaerie*: what does the reference "to the maximum extent appropriate" mean; "appropriate" to whom, what?

   b) Some of the differences have reflected philosophy, *e.g.*, all children with disabilities should be educated with children who are not disabled, regardless of the severity of the disability.

F. The fifth basic: special education is all procedure, no substance

1. IDEA neither requires nor prescribes a "level" of education for students?
2. IDEA is built on three tiers of procedures:

   a) Procedures to develop IEP

   b) "Procedural safeguards"

   c) Complaints and due process/litigation

Sources of Special Education Law, Policy and Practice						
	Statute	**Regulations**	**Judicial Decisions**	**Administrative Decisions**	**Administrative Interpretations**	
					OSEP (IDEA)	**OCR (504)**
FEDERAL	IDEA [OSEP]	34 CFR 300	USSC	State plan approval	OSEP Memoranda	OCR Policy Document System
	Rehabilitation Act [OCR]	34 CFR 104	Courts of Appeals (*e.g.*, 9th Circuit)		Policy Letters	Letters of Finding (LoF)
	FERPA [FPCO]	34 CFR 99	District Courts (*e.g.*, D. Wa.)		Letters to constituencies, *e.g.*, Governors, Chief State School Officers, State Directors of Special Education	Letters to constituencies, *e.g.*, Governors, Chief State School Officers, State Directors of Special Education
STATE	Missouri Revised Statutes (Education and Libraries) §§ 160-162, 167	???	Missouri Revised Statutes, Ch. 536, §§ 536.100 – 536.140	Missouri Administrative Hearing Comission *Appealed per* Missouri Revised Statutes, Ch. 621, § 621.145	Office of Special Education, Division of Learning Services, Missouri Department of Elementary and Seconday Education	???

II. Some Definitions and Terminology[2]

A. Basic Principles and Concepts

1. FREE APPROPRIATE PUBLIC EDUCATION (FAPE). — special education and related services that
   a) have been provided at public expense, under public supervision and direction, and without charge;
   b) meet the standards of the State educational agency;
   c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
   d) are provided in conformity with the individualized education program required under section 614(d).
2. LEAST RESTRICTIVE ENVIRONMENT — To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
   a) ADDITIONAL REQUIREMENT — A State funding mechanism shall not result in placements that violate the requirements of the least restrictive enviornment, and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.
3. SPECIAL EDUCATION — specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including —
   a) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
   b) instruction in physical education.
4. RELATED SERVICES — Transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and

[2] See IDEA, §1401 and also, for example, http://www.ldonline.org/glossary: http://www.wrightslaw.com/links/glossary.sped.legal.htm; http://www.dphilpotlaw.com/html/glossary.html;

medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

a) EXCEPTION —The term does not include a medical device that is surgically implanted, or the replacement of such device.

5. INDIVIDUALIZED EDUCATION PROGRAM (IEP) — A written statement for each child with a disability that is developed, reviewed, and revised in accordance with mandated procedures consisting, at a minimum, of a description of basic levels of performance, educationl goals, educational programs and related services required to reach those goals and specification of how progress will be measured.

6. ASSISTIVE TECHNOLOGY DEVICE (ATD) — any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.

7. SUPPLEMENTARY AIDS AND SERVICES — aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate.

8. TRANSITION SERVICES — a coordinated set of activities for a child with a disability that —

a) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

b) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

c) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

B. Administrative and Structural

1. PARENT — a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent); a guardian (but not the State if the child is a ward of the State); an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or an individual assigned to be a surrogate parent. 34 CFR 300.20(a)(3).

a) If no parent can be identified, the district cannot discover the whereabouts of the parent after reasonable efforts, or the child is a ward of the state, the district must assign an individual to act as a surrogate for the parent and there are procedures relating to the training and selection of such persons. 34 CFR 300.515.

b) If a foster parent meets certain requirements, the person can be a parent within the meaning of IDEA. 34 CFR 300.20(b).

c) In divorce situations, care should be taken to examine the order regarding custody in terms of whether it is with one parent or joint and whether it includes educational matters. Where custody is joint, both parents have the right to participate in the IEP and appeal it. Moreover, non-custodial parents have been held to have rights (albeit not contesting an IEP) (e.g., access to records, participating in an IEPT, observing the child, etc.).

2. LOCAL EDUCATIONAL AGENCY (LEA) — a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools, *e.g.,* a school district.

3. STATE EDUCATIONAL AGENCY (SEA) — the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law, e.g., state office of public instruction.

4. EXCESS COSTS — those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school year for an elementary school or secondary school student, as may be appropriate, *e.g.,* the additional costs of educating a student with disabilities.

C. Disabilities

1. CHILD WITH A DISABILITY — a child having one or more of the following disabilities who, by reason thereof, needs special education and related services.

a) mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

2. AUTISM — a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive

activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

3. DEAF-BLINDNESS — concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

4. DEAFNESS — a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

5. EMOTIONAL DISTURBANCE — a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

    a) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

    b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

    c) Inappropriate types of behavior or feelings under normal circumstances.

    d) A general pervasive mood of unhappiness or depression.

    e) A tendency to develop physical symptoms or fears associated with personal or school problems.

6. HEARING IMPAIRMENT — an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

7. INTELLECTUAL DISABILITY — significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

8. MULTIPLE DISABILITIES — concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

9. ORTHOPEDIC IMPAIRMENT — a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (*e.g.*, poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (*e.g.*, cerebral palsy, amputations, and fractures or burns that cause contractures).

10. OTHER HEALTH IMPAIRMENT — having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and adversely affects a child's educational performance.

11. SPECIFIC LEARNING DISABILITY (SLD) — a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

    a) SLD includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

    b) SLD does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

12. SPEECH OR LANGUAGE IMPAIRMENT — a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

13. TRAUMATIC BRAIN INJURY (TBI) — an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance.

    a) TBI includes head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech.

    b) TBI does not include brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

14. VISUAL IMPAIRMENT INCLUDING BLINDNESS — an impairment in vision that, even with correction, adversely affects a child's educational performance, and includes both partial sight and blindness.

III. Child Find

A. You can't educate them if you don't know who or where they are

1. Each SEA and LEA must identify, locate, and evaluate all children with disabilities residing in the state/district, including those in private schools or homeless, who are in need of special education and related services.
2. How this is to be accomplished is not specified. Typically it is through public service announcements, brochures, school newsletters, etc.
3. School district personnel (teachers and administrators) may suggest to parents that their children be screened and evaluated if they suspect that a student has an eligible "disability." However, this incentive has decreased as costs of special have increased.

B. Key Fact: Not all children with a "disability" are eligible for special education.

1. Children with disabilities who are not eligible for services under IDEA may nevertheless be covered by §504 of the Rehabilitation Act or the Americans with Disabilities Act.

IV. Eligibility and Scope

A. Age range

1. IDEA addresses needs of children up to "majority," as determined on a state-by-state basis:
   a) "Early education" is 0 through 2 (Part C of IDEA)
   b) Elementary and secondary education, typically referred to as "special education," is basically 3 to 21. (Part B of IDEA, Regs. At 34 CFR Part 300.300.
   c) IDEA does NOT cover post-secondary education, *e.g.*, colleges, universities. However, these institutions are barred from discriminating against persons with disabilities, incuding students, by §504 of the Rehabilitation

Act and the Americans with Disabilities Act, and are obliged to provide reasonable accommodations.

d) However, IDEA requires that students be prepared to "transition" to post-secondary environments, including education and the workplace; see, *e.g.*, IDEA requirements concerning transition planning.

2. We will cover only Part B, *e.g.*, elementary and secondary education.

B. Eligibility and "child with a disability"

1. Under Part B, "child with a disability" means a child:

   a) evaluated in accordance with IDEA regulations (34 CFR 300.530-536);

   b) having characteristics of one of the categorical impairments; and

   c) because of the impairment(s), needs special education or related services. See 34 CFR 300.7.

2. Only "eligible" "child with a disability" can receive "special education" under Part B; this constitutes about 10-12% of the student population, although range among school districts ranges up to 18-20%.

3. For types of disabilities, see definitions, above.

C. Limits

1. Severity of Disability: Can a child be so "disabled" as to be uneducable? In *Timothy W. v. Rochester Sch Dist*, 875 F.2d 954, 441 IDELR 393 (1st Cir. 1989), a student had such severe disabilities that the only services which could be provided to him consisted of stimulation and physical therapy. The First Circuit Court of Appeals found him eligible for services under IDEA, adopting what has come to be known as the "zero reject" theory as being what Congress intended.

2. Location: Students with disabilities are not excluded merely because they happen to be in hospitals, institutions, jails, or prisons. Moreover, the student's condition, such as carrying the HIV virus, does not cause them to be ineligible for services, typically in school. A district cannot exclude a student from school for health reasons unless it can show unusual risk that cannot be reasonably controlled by sanitation or other procedures.

3. Behavior: Misconduct, whether related to the disability or not, cannot serve as a basis to deny the student services. If the misconduct is a consequence of the disability, the educational program must reflect that and the education must occur in school. If not, the student is still entitled to an education, whether in an institution or at home.

4. Possible events terminating eligibility

   a) Graduation (inasmuch as post-secondary education is not required per 34 CFR 300.13(c)), *i.e.*, completion of regular education requirements and special education requirements, including adequate progress on IEP goals (as well as transition goals). 34 CFR 300.122(a)(3).

   b) Some students "age out" at 21.

c) Many drop out.

d) Few are "cured" (or no longer found eligible).

D. Scope of "Education"

1. In the preamble to IDEA, Congress has said that the goal of education is "To prepare all children to lead productive, independent adult lives, to the maximum extent possible." Clearly, academics are only one part of the educational experience. Life skills, social competence and activities of daily living are major elements of the IEP of a child with a disability.

2. An OSEP inquiry, 17 EHLR 54 (Sept. 14, 1990) addressing the question: "What is an operational definition of 'educational performance'?" stated, in part:

   a) "Thus, a child's educational performance must be determined on an individual basis and should include **non-academic** as well as academic areas.

   b) "Since the educational needs of a child with a disabling condition include **non-academic** as well as academic areas, the term 'educational performance' as used in the EHA-B means more than academic standards as determined by standardized measures." (Emphasis added.)

V. Referral/Evaluation

A. You can't provide appropriate services if you don't know what they need.

1. An "evaluation" means procedures to determine:

   a) eligibility; and

   b) the nature/extent of **all** special education and related service needs (and **not** just those linked to the student's disability category). 34 CFR 300.304(c)(6).

2. An assessment plan should address what additional data is needed to determine:

   a) Eligibility for special education under IDEA (*e.g.*, funding);

   b) present level of performance and educational needs (PLOPs);

   c) special education and related service needs; and

   d) additions/modifications to enable the child to meet IEP goals and participate in general curriculum. 34 CFR 300.39.

3. The process must include functional/developmental information regarding the student's involvement progress in the general curriculum. 34 CFR 300.304.

4. IDEA regulations require that before being provided special education programs and related services, a student must be given a comprehensive assessment meeting a variety of specific requirements, including:

   a) tests/measures administered in child's native language,

b) valid for the specific purpose used,

c) administered by trained personnel,

d) tailored to assess specific areas of educational need,

e) selected/administered to ensure it measures what it purports to measure,

f) not used as a single procedure/sole criterion, and

g) assess in all areas of suspected disability.

B. Periodic Re-evaluations

1. A reevaluation of a child must be conducted every three years or more frequently if "the public agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant" or the parent or teacher requests it. 34 CFR 300.303(a).

2. A reevaluation shall not occur more frequently than once a year (unless the parent and district agree otherwise) and the parent and district can also agree to waive the once every three years requirement. 34 CFR 300.303(b).

3. If the assessment planning team decides a reevaluation, in total or in part, is not necessary, the district must notify the parents, note the reasons, and advise the parents of their right to request a reevaluation in total if they choose. 34 CFR 300.305(d).

C. Parental Notice and Consent

1. Prior notice and parent consent is necessary before conducting either an initial evaluation or an initial placement. 34 CFR 300.504. (IDEA requires consent for reevaluation as well unless the district can show it has taken "reasonable measures" to obtain consent and the parents failed to respond. 34 CFR 300.500.) Absent an additional requirement under state law, thereafter additional consents are not necessary. If a parent attempts to "revoke" consent, the district still has all of its obligations under IDEA and the revocation is not retroactive. 34 CFR 300.500(6)(I)(iii)(B).

2. If a parent refuses or fails to respond to a request to provide consent for an initial evaluation, a district may go to hearing to try and override it. But, if the parent refuses to consent to the initiation of services, the district is prohibited from going to an override hearing (and its failure to do so will not be considered a denial of FAPE). Sec. 1414(a)(1)(D).

D. Timelines

1. An evaluation must be completed within 60 calendar days of when the district received parental consent, unless an SEA has a shorter timeline.

2. The 60-day timeline does not apply if a district did not receive the referred student until after the period started to run if:

a) the district is making "sufficient progress to ensure prompt completion of the evaluation"; and

b) the parent and district agree to a specific completion date or the parent repeatedly fails/refuses to produce the child. Sec. 1414(a)(1)(C).

E. Determination of Eligibility

1. Eligibility for special education, based upon the evaluation, must be determined by a team of qualified professionals and the parent(s) and is made on a consensus basis. Failure to reach a consensus can be a subject for a due process hearing (dispute resolution procedure, see below).

2. A copy of the evaluation report and eligibility determination must be given to the parent upon completion of administration of tests and other evaluation materials. 34 CFR 300.534(a).

3. If a parent disagrees with an evaluation by a district, the parent may seek an independent educational evaluation (IEE), either paying for one themselves or requsting one at public expense.

4. Upon receipt of a request for an independent evaluation at public expense, the district must either grant it or go to hearing to show that its evaluation is appropriate. 34 CFR 300.502.

   a) As a practical matter, districts frequently, though not always, pay for the IEE given the cost is less than going to a hearing.

   b) Disputes more frequently arise over who will be accepted as the "independent" evaluator(s), as the school district has some discretion in this regard.

5. The evaluation team must "consider" any evaluation other than its own submitted by the parents. It is not clear what this means.

6. The evaluation team determines the student's "primary" disability for eligibility purposes and identifies any other disabilities that may require special education and related services.

VI. Individualized Education Programs (IEP)

A. Where the student Is now, what education/services will be provided, performance expectations

1. An IEP is the "keystone" for the provision of special education and, therfore, it must be developed ("in place") before a special education or related services are provided. 34 CFR 300.342.

2. There are many requirements regarding development and content, *e.g.*, 34 CFR 300.320-328, and much caselaw.

3. Bottom line: IEP will be "judged" on whether it provides a free appropriate public education (FAPE).

B. IEP is developed by the IEP team (often same members as evaluation team).

1. Minimum IEP team members specified by regulation (34 CFR 300.321):
    a) The parent(s). Every effort must be made to obtain the parent's participationSchool district representative qualified to supervise/provide special education.
    b) At least one regular education teacher must attend if the child is/may be participating in general education. In the 9th Circuit, as a practical matter, there is a presumption that the child will be in general education so there should always been a general education teacher present, *c.f., M.L. v. Federal Way School District*.
    c) Child's special education teacher/provider.
    d) District person qualified to provide/supervise special education, "knowledgeable about the general education curriculum," and one knowledgeable about the district's available resources.
    e) Person who can interpret the "instructional implications" of evaluation results (may be one of the other specified members, *e.g.*, teacher).
    f) At the discretion/invitation of parents/school, "other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate." The determination of knowledge and special expertise is made by the party extending the invitation.
    g) The child may attend if appropriate, as well as others, at the discretion of the parent/district.
2. Other IEP team members dependent upon needs
    a) If transition services are to be considered, a representative of any other agency providing/paying for such service.
    b) Interpreters if necessary to enable the parents to understand the proceedings.
3. Consult latest regulations concerning required attendance or permissible excusals depending upon child's needs and agreements between the parents and the school district.
    a) IEP team member may be excused if the parent and district agree in writing that the member's area of curriculum/related services is not being modified/discussed at the meeting.
    b) IEP team member may be excused, even where the meeting involves a modification to/discussion of the member's area of curriculum/related services, if the parent and district agree in writing that the member may submit written input prior to the meeting.
    c) IEP team members can participate in meetings by telephone, video-conference, etc.

C. Minimum IEP Contents.

1. The IEP must be developed within 30 calendar days following evaluation and contain the following:

   a) Statement of child's present level of academic achievement and functional performance, including
      (1) involvement/progress in the general curriculum
      (2) for preschoolers, participation in appropriate activities

   b) Special education and related services to be provided (including extent of participation in general education and explanation why not greater), including:
      (1) Beginning date
      (2) Frequency
      (3) Duration

   c) Measurable annual goals

   d) Explanation of the extent, if any, child will not particiapte with nondisabled children in the regular class and activities

   e) Statement of any individual modifications in administration of State or district-wide assessments (WASL)

2. The IEP may also require the following:

   a) If the student is age 16 or older, needed transition goals and services, projected dates for initiation of services/duration, and objective criteria/evaluation procedures for determining whether goals are being achieved.
      (1) The IEP team must conduct appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. Then, based on the results of these assessments, transition goals must be established for the student and transition services, including courses of study, provided as needed to assist the child in reaching the goals. Sec. 614(d)(1)(A)(i). This is a recent change in that previously transition services were a coordinated set of activities designed with an outcome oriented process to promote movement from school to post-school activities. Now, transition is a result oriented process to facilitate movement from school to post-school activities.
      (2) While other community agencies are to be invited to participate in an IEPT meeting and provide services in cooperation with the district, if those agencies fail to provide such services, IDEA requires that the district do so. 34 CFR 300.348(a). Historically, this has been problematic, particularly as funding for those agencies' services has been curtailed.

   b) Description of assistive technology needs and services: ATD means basically any item/equipment/product system used to increase/maintain/improve the functional capabilities of children with disabilities. 34 CFR 300.5. Assistive technology service means any services that directly assist a child with a disability and the selection/acquisition/use of an ATD. 34 CFR 300.6. Most recently, in response to court decisions which held

that the mapping cochlear implants was a related service, IDEA was amended to except from the definition of ATDs a "medical device that is surgically implanted or the replacement of such device." Sec. 1402(1)(B) and (26)(B).

c) Whether student requires extended school year (ESY) services (compare "summer school")

(1) It is important to distinguish education programs and services commonly provided to most or all students, e.g., "summer school," from extended school year services (ESY). ESY is an individualized program based on the student's needs.

(2) IDEA does not provide a test to determine when such is "necessary." Various federal circuit courts have established tests. The majority utilize what is commonly referred to as the "regression without reasonable recoupment" standard (*i.e.*, does the child with regard to one or more goals regress over the summer regarding that skill to the point where they cannot recoup the skill within a reasonable period of time upon return, typically approximately seven weeks). Other circuits have stated ESY should be provided when the child's situation requires a "continuous" educational experience to be appropriate or that the student's skills need to be "maintained" or "enhanced" during the summer period to be appropriate.

d) Where behavior impedes learning of student or others, consideration of strategies and supports addressing behavior

e) Where child has limited English proficiency, consider language needs

f) If child is blind/visually impaired, provide for Braille instruction

g) If child is deaf/hard or hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode

3. IEP must address **all** of a child's special education and related service needs, not just those related to their eligibility category. 34 CFR 300.300(a)(3).

a) Special education/related services/supplementary aids must be "based on peer reviewed research to the extent practicable." Sec. 1414(d)(1)(A)(i)(IV).

D. Procedural Considerations and Requirements

1. A district must give the parent a copy of the IEP. 34 CFR 300.345(f).

a) District must also inform each person responsible for implementation their specific responsibilities (*i.e.*, teachers) and any "specific accommodations or modifications/supports" the IEP requires. 34 CFR 300.342(b) (although this requirement is proposed to be deleted in the proposed regulations).

2. After an annual IEP is developed, a district and parent may agree to change the IEP and not convene an IEP tem meeting by agreeing to amend/modify the current IEP in writing. Sec. 1414(d)(3)(D).

3. Not less than annually, a child's IEP is to be reviewed and revised as appropriate to address any lack of expected progress toward annual goals, the results of any reevaluation, information about the child provided by the parent, the child's anticipated needs, or other matters. 34 CFR 300.343(c).

4. If a "methodology" is an "integral part" of what is individualized about a child's education, it must be in the IEP. See Federal Register, Vol. 64, No. 48 (March 12, 1999), at pp. 12552 and 12595. But, the components of the method–not the method's label/name, should be noted in the IEP.

5. Where a student with disabilities moves to a new district within the same state during the school year and the parties are unable to agree on an interim placement, the new district must implement services comparable to those in the old IEP until it adopts the old IEP or a new IEP is developed. Where a student transfers from one state to another during the school year, the situation is basically the same. Sec. 614(d)(2)(C)(i).

6. A district must give good faith effort to assist the child to achieve IEP goals. It (and staff) will not be held accountable if the child does not (i.e., not guarantee). 34 CFR 300.350. (This clarification was proposed to be deleted in the proposed new regulations.)

VII. Placements

A. Prior Notice and Consent

1. Just as with the initial evaluation of a student, prior notice and parent consent is necessary regarding an initial placement. 34 CFR 300.504. However, thereafter, unless the parent requests a due process hearing, the district should proceed to implement it. *J. J. Garcia v. Board of Education*, 558 IDELR 152 at 155 (D.C. D.C. 1986).

2. The placement decision must be made by a group of persons knowledgeable about the child, the evaluation data and placement option (typically the IEP participants) and must be done in conformity with LRE rules, documented information, etc. 34 CFR 300.535. Under IDEA, the parents must participate in the group. 34 CFR 300.501(c).

B. Least Restrictive Environment (LRE)

1. IDEA requires that "to the maximum extent appropriate," children with disabilities be educated with children without disabilities and that segregation occur only when the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR 300.550. Among the factors to be considered in determining the LRE:

   a) Is it the school closest to the child's home?

b) Is it the school the child would have attended if not disabled?

c) Are there any potential harmful effects on the child or on the quality of services the child needs?

d) Is there disruption in the regular education setting which significantly impairs the education of other students. 34 CFR 300.552.

2. Generally, LRE means that children with disabilities must be educated with children without disabilities to the maximum extent appropriate considering various factors. In years past, the term "mainstreaming" was used, albeit not a legal term. More recently, the term "inclusion" has been used, but it also is not a legal term.

3. LRE is not an option. It is a mandate. But, the student does not have an absolute right to be in a general education classroom or in their "home" school, only the right to have such considered first and rejected for good reason.

a) The LRE for each student must be determined based upon an analysis of the above factors and the child's individualized situation.

4. IDEA and its regulations do not set down a "test" to determine LRE, but OSEP (Memorandum 95-9, 21 IDELR 1152 (OSEP 1994)), and most federal circuits across the country have created their own tests. They vary in significant ways so check the test of the federal circuit in which you are located. Many of the tests ask a series of questions, such as:

a) has the district taken steps to accommodate the student in the general education setting?

b) would the district need to provide too much support to the general education teacher and modify the general education curriculum too much?

c) would the child receive any educational benefit from the general education setting academically, socially, or otherwise?

d) how do the benefits of general education versus special education balance out for the child?; and

e) what is the effect of the student's presence in the general education environment on other students (*e.g.*, disruptive, etc.)?

5. It must also be remembered that participation in the general education curriculum does not mean having to be in a general education classroom. The general education curriculum can be taught in a special education classroom.

a) Moreover, participation in general education settings is not an all or nothing matter. Some of the student's needs might be met in a general education setting (with supports), while other needs might be met in special education settings.

b) LRE principles also apply to the non-academic aspects of the education experience, *e.g.*, sports, lunch, transportation of a student to and from school.

c) Finally, inasmuch as communication is an essential fundamental in the provision of education, what constitutes the LRE for deaf students, particularly for those who strongly support the "deaf culture," has been the subject of much debate and controversy over the years.

VIII. At No Cost ("Free")

A. IDEA requires that a FAPE be "without charge" and that special education be "at no cost." 34 CFR 300.13 and 26.

1. "At no cost" is defined to mean without charge, but not precluding incidental fees that are normally charged to non-disabled students or their parents as part of the regular education program. 34 CFR 300.126(b)(1). Accordingly, parents may volunteer or acquiesce to provide transportation, serve as an aide, etc., but such cannot be made a condition by a district for a child to receive a program or service. Further, the parent has the right to be paid reimbursement for mileage, their time, etc.

2. The cost of providing an educational program is legally not to be a factor in discussions or in determining which programs/services to be provided except:

   a) if there are two or more appropriate options, the cheaper one can be utilized;

   b) "center" programs can be used for low-incidence populations.

B. Funding from Outside the School District

1. IDEA specifically allows and contemplates interagency agreements to assure the funding of programs.

2. It is expressly provided that an insurer or similar third party is not relieved from an otherwise valid obligation to provide or pay for services provided to a student under IDEA. 34 CFR 300.301. Potential insurers or other third parties might include a student's health insurance, no-fault/automobile insurance, Medicaid reimbursement, adoption subsidies, etc.

   a) If insurers or other third parties are to be utilized, the "without cost" to the parent requirement means, for example, the filing of a health insurance claim cannot pose a realistic threat of the student suffering a financial loss (*e.g.,* decrease in available lifetime coverage, increase in premiums, discontinuation of policy, or payment of deductible). Policy Interpretation, 103 IDELR 24 (1980).

IX. Related Services

A. "Related services" means supportive services "required to assist a child . . . to benefit from special education."

1. The list in the rule is illustrative, not exhaustive. 34 CFR 300.24. Some states, to avoid being unable to use IDEA funds for related services not required to assist a student to benefit from "special education," define special education as including related services.

2. Noteworthy are the number of related services which specifically address providing services to parents, helping parents acquire skills to support implementing IEP and to work in partnership with schools. 34 CFR 300.24(b)(5), (9), and (13):

   a) "parent counseling and training"

   b) "psychological services" (including psychological counseling)

   c) "social work services in schools," including group and individual counseling with the child and family, .

B. Status of medical services

1. "Medical services" are defined as services provided by a physician and they are allowed only with regard to evaluation, that is, for diagnostic purposes, and not the provision of other services.

2. "School nurse services" and "school health services" are those provided by a nurse or other qualified person. In *Irving Independent School District v. Tatro*, 468 U.S. 883, 555 IDELR 511 (1984), the court held the district was obligated to provide these services only if necessary to aid the student to benefit from special education (*i.e.*, had to be done during the school day rather than before or after, and could be provided by a school nurse/qualified person and not a physician). 34 CFR 300.24.

C. Related services are also referenced in the LRE requirements

1. "The use of supplementary aids and services" must be offered in the regular education environment in an attempt to satisfactorily achieve integration before segregating the student. 34 CFR 300.550(b)(2).

X. Discipline

A. Behavior flowing from disability

1. There are different rules for disciplining students with disabilities because the teaching of appropriate behavioral/ social skills are required when a student needs such as a result of his or her disability.

2. When a student with a disability engages in behavior that would subject a nondisabled student to disciplinary procedures, the crucial issue is whether the student's (mis)conduct is a "consequence" of the disability, *i.e.*, whether the behavior/conduct subject to discipline is related to the student's disability.

   a) However, student with a disability can be "disciplined," *i.e.*, suspended for less than 10 days, on the same terms as student without disability.

3. This determination is made initially in a "manifestation determination hearing." Two questions must be addressed (Sec. 1415(k)(1)(E)(i)):

   a) was the conduct in question caused by, or had a direct and substantial relationship to, the child's disability; or

b) was the conduct in question the direct result of the district's failure to implement the IEP.

4. If the conduct/behavior is not related to the child's disability, then the district may discipline the child as it would children without disabilities.

5. If the conduct/behavior is found to be related to the disability, a functional behavioral assessment (FBA) must be conducted and a behavior intervention plan (BIP) developed, if not previously done, or if so, the FBA and BIP reviewed, with the child returning to the prior placement unless the parent and district agree otherwise. Sec. 1415(k)(1)(F).

B. Provision Is Made for "Special" Circumstances

1. Special procedures for expedited hearings are available where misconduct involves potentially "dangerous" situations, *e.g.*, those involving weapons, drugs, controlled substances, and where a substantial likelihood of injury will occur to the child or others, are very complicated. See the chart entitled "Discipline 'Ground Rules'" at the end of this outline.

2. The procedures for expedited hearings vary from traditional hearings. For example, the hearing is to occur within 20 school days of the date the hearing is requested and a determination is to be made within 10 school days after the hearing. Sec. 1415(k)(4).

a) The proposed regulations provide that a "resolution session" must be scheduled in 7 days and completed within 15 days or the above hearing timelines will start running.

C. Student Not Identified or Determined IDEA Eligible

1. For students who have not yet been determined eligible under IDEA, the district will be deemed to have had knowledge that the child was a child with a disability if, prior to the behavior that precipitated the disciplinary action:

a) the parent expressed written concern to supervisory/administrative personnel of the district or a teacher that the child needed special education;

b) the parent requested an evaluation; or

c) the teacher or other district staff express specific concerns about a pattern of behavior directly to the director of special education or the supervisory staff. Sec. 1415(k)(5)(B).

2. A district is not deemed to have had such knowledge if the parent did not allow the child to be evaluated, the child was evaluated and found not eligible or the parent refused special education services.

3. If a request for evaluation is made after the child is subjected to disciplinary measures, the evaluation is to be expedited. But, pending results of the evaluations, the child remains in the placement determined by the district.

XI. Procedural Safeguards

A. Remember Fifth Basic: IDEA is procedures, not substance

1. Procedures for development of IEP (including evaluations, assessments, etc.)
2. Dispute Resolution procedures (complaints, mediation)
3. "Procedural safeguards"

B. Complaints and Mediation

1. Each state must establish a procedure for the filing of complaints with SEA (*i.e.*, alleged violations of IDEA). 34 CFR 300.660-662.
   a) The regulations provide that an SEA in its procedures regarding complaints must provide that a district have the opportunity to respond to a complaint, including a proposal to resolve it, and if the parent consents, the opportunity to resolve the complaint through mediation or some other means, with the 60 day time limitation being automatically extended upon agreement of the parties.
   b) A complaint must be filed within one year of the alleged event unless it alleges a matter under the new two year statute of limitations covering hearings. Money reimbursement, compensatory services and other corrective action can be provided if a FAPE was found to be denied. 34 CFR 660(b).
   c) A parent may utilize either or both of the complaint or hearing processes. Letter to Chief State School Officers, 34 IDELR 264 (OSEP 2000).
   d) If an issue has already been decided in a due process hearing, then that decision should prevail over a complaint investigation of the same issue. Alternatively, the results of a complaint investigation may be presented as evidence in a hearing. If the parents have commenced both processes, the complaint may be held in abeyance pending conclusion of the hearing. If no hearing has also been requested, the complaint must be pursued and resolved within 60 days.
2. Mediation is available at any time
   a) Each state has a mediation system in which parents/schools may voluntarily participate at no cost. It cannot deny or delay a parent's right to a hearing.
   b) Districts and parents choosing not to utilize the mediation process can be required by a state or district policy to meet with a disinterested third party who would encourage and explain the benefits of mediation.
   c) Mediators are required to be trained and be knowledgeable in the laws regarding special education. Mediation is available to parties even before they might file a request for a due process hearing. 34 CFR 300.506.
   d) A mediation agreement must be written, confirmed that the discussions were "confidential" (*i.e.*, cannot be used later as evidence in any subsequent proceeding), and be signed by the parent and a district representa-

tive with the authority to bind it. The agreement is enforceable in any court of competent jurisdiction. Sec. 1415(e).

C. "Procedural Safeguards" generally refer to the array of rights of parents/students set forth in Subpart E (beginning at 300.500) and specifically in Reg. 300.504.

1. Among these safeguards are the right to examine records, the appointment of a surrogate parent if the parent is unknown/unavailable/a ward of the court, independent educational evaluations, the right to file complaints for alleged violations of law, the right to request a due process hearing, prior notice and consent, a procedural safeguards notice, the right to have the child "stay put" pending appeals, and attorneys' fees if a prevailing party. 34 CFR 300.502-.517.

2. Notice of safeguards notice must be given to the parent only once a year; however, a copy must also be given when a parent makes an initial referral or request for evaluation, first requests a due process hearing, or requests one.

   a) Many school districts have followed the practice of giving a copy of the procedural safeguards at the beginning of every meeting with parents.

   b) New regulations reduce burden of notice.

D. When Prior Written Notice (PWN) Must Be Provided

1. When a district proposes/refuses to initiate/change the identification, evaluation, placement or FAPE of a child

2. PWN must include:

   a) a description of the action proposed/refused;

   b) an explanation of why;

   c) a description of other options considered and why rejected;

   d) a description of each evaluation procedure/test/report used by the district as a basis for the proposed/refused action; and

   e) a description of other relevant factors to the district's proposal/refusal.

3. The parent must be advised where to get a copy of procedural safeguards if not enclosed and sources to contact to obtain assistance in understanding their rights. 34 CFR 300.503.

XII. Due Process Hearing

A. Primary "procedural safeguard" is the right to a "due process" hearing.

1. Parent has the right to a hearing (administrative) on any matter relating to identification, evaluation, placement and FAPE.

2. Parent must be given information on availability of free/low cost legal and other relevant services and attorneys' fees.

3. The hearing officer must:

a) be impartial (i.e., not involved in the education of the child or have a personal/professional interest conflicting with objectivity).

b) have knowledge of/ability to understand IDEA and legal interpretations of courts,

c) have knowledge/ability to conduct appropriate legal hearings, and

d) have knowledge/ability to render and write appropriate legal decisions.

4. IDEA allows a state to establish a two tier hearing system, i.e., initial "due process" hearing, with an appeal to a state level "review" hearing.

a) If so, generally the same rights are present and the decision must be rendered within 30 days of the appeal. Thereafter, either party may appeal to a state or federal court. 34 CFR 300.512.

b) State are about evenly divided in requiring hearing officers to be attorneys.

(1) Some states have delegated hearing responsibility to "central panel" of state administrative law judges, all of whom must be attorneys.

(2) Others contract with individuals, who may or may not be attorneys.

5. At the hearing, parties have the right to counsel, to present evidence, confront/cross examine/compel witnesses, prohibit evidence not disclosed 5 days before the hearing, and obtain either a written or electronic record and decision.

a) The parent can opt for the hearing to be open (public) or closed (private).

6. The hearing decision is to be rendered within 45 days of the date the hearing was requested, unless it is extended by the ALJ/HO upon request for good cause.

a) Hearings typically take much longer due to the parties finding mutually convenient hearing dates, wanting to pursue settlement via mediation or otherwise or desiring additional evaluations. 34 CFR 300.509 and 511.

b) Extensions are supposed to "discrete," e.g., for a specific reason and for a specified period of time.

7. The decision must be made on substantive grounds based upon a determination of whether a child received a FAPE.

8. Where a parent alleges a procedural violation, the ALJ/HO may find the child did not receive a FAPE only if procedural inadequacies:

a) impeded the child's right to a FAPE;

b) significantly impeded the parent's opportunity to participate in the IEPT meeting; or

c) caused a deprivation of educational benefits. The ALJ/HO can order a district to comply with IDEA's procedural requirements in any event.

B. Aspects of Due Process Hearing

1. Limitations: request for due process hearing must allege a violation "that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint" (unless the state has another time frame), unless the parent was prevented from requesting the hearing due to:
   a) specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint; or
   b) the district withheld information from the parent that was required to be provided the parent. Sec. 1415(b)(6)(B) and 615(f)(3)(C) and (D).
2. SEAs must develop a model form for such notice (as well as a complaint). Sec. 615(b)(8).
3. The due process request is required to be provided to the other party and the SEA before the due process hearing.
   a) If a school district upon receipt of the notice has not sent a prior written notice (PWN) to the parent regarding the matter raised in the notice, the district has within 10 days of receipt of the notice to send the parent prior written notice.
4. The party receiving the request can assert the request is insufficient within 15 days of receipt by bringing it before a hearing officer, with a copy to the other party; otherwise, the request will be deemed sufficient).
5. Within 5 days after receipt of the claim of insufficiency, the hearing officer must determine on the face of the request whether it meets the requirements and so notify the parties in writing. Within 10 days after receipt of a sufficient notice, that party must provide a written response that specifically addresses the issues raised in the notice.
6. A party may amend its notice only if:
   a) the other party consents in writing and is given an opportunity to resolve it through a resolution session; or
   b) the hearing officer grants permission not later than 5 days before the hearing. If a notice is amended, the timeline for a resolution session and the hearing recommences at that point.
7. A party requesting the hearing is not allowed to raise issues at the hearing that are not raised in the notice unless the other party agrees. But, it is expressly provided a parent can file a separate due process complaint on an issue "separate" from a due process hearing complaint already filed. Sec. 1415(b)(8), 1415(c)(2), and 1415(f)(3)(B) and 1415(n).

C. Resolution Session

1. A "resolution session" is now required within 15 days of receiving the parent's request for a hearing.
2. It must be attended by the parent and "the relevant member or members of the IEP team who have specific knowledge of the facts identified in the" notice. A representative of the district who has decision-making authority

must also attend. The district's attorney cannot attend unless the parent has an attorney.

3. If attorneys do participate, there is no right to recover attorney fees if the parties resolve the matter through a resolution session.

4. If the parent and district agree, they may waive the meeting or agree to use mediation as an alternative. Sec. 1415(f)(B) and (D)(iii).

5. If the district and parent have not "resolved" the matter to the parent's satisfaction within 30 days of receipt of the hearing request, the due process hearing may proceed (with the timelines for the hearing commencing).

6. If a resolution is reached, the parties shall have a written agreement that is legally binding, signed by the parent and an district representative with authority to bind it, which is enforceable in a court of competent jurisdiction.

7. Either party may void any such agreement within 3 business days after it is signed.

D. Maintenance of Placement ("Stay Put")

1. Once request for due process hearing has been filed, student's then-existing educational placement must remain unchanged until conclusion of litigation, unless school and parents otherwise agree.

   a) "Educational placement" may be different from educational "setting," *i.e.*, a change in location (from one school to another) may not be a change of placement if all the programmatic elements remain unchanged.

2. While it is usually obvious what constitutes the "then-existing educational placement," this is not always the case; moreover, parents frequently work to obtain a "satisfactory" placement immediately before filing a hearing request.

   a) The Sixth Circuit Court of Appeals has held that it is the "operative" or "then current" placement at the time the dispute arises. Thomas v Cincinnati Bd of Ed, 17 IDELR 113 (6th Cir 1990).

   b) Also, if a parent prevails in the last state administrative decision, it constitutes the "stay put" if the litigation continues. 34 CFR 300.514(c).

3. If something changes in a child's educational situation (e.g., the teacher, the building, the bus pick up/drop off location/time, suspension from an athletic team, etc.), a question arises as to whether a "change in placement" has occurred in violation of IDEA, most notably the child's IEP.

   a) The generally accepted view is that for a change in educational placement to occur, a student's program must be "materially altered, not just for example by a change in location, but rather a fundamental change in or elimination of a basic element of the educational program, affecting a child's learning experience in a significant way." Letter to Fisher, 21 IDELR 992 (OSEP 1994).

E. Scope of Hearing Officers' Authority

1. Due process hearings may address "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 1415(b)(6);
    a) A hearing officer (or a court) has the authority to obtain an independent educational evaluation at public expense, 30 CFR 300.502(d).
2. However, because of the unusual status of hearing officers, there is an extremely wide variation in the definition and understanding of the scope of a hearing officer's authority.
    a) Most hearing officers view their authority as prescribed primarily by state law.
    b) Many hearing officers believe/contend that they have no authority other than that affirmatively defined by state law.
    c) Very few see themselves as having the authority to broadly address the issues identified in IDEA 1415(b)(6), above.
3. Personal Opinion: Most hearing officers lack the understanding and training necessary to fulfill the role envisioned by Congress, *i.e.*, to determine what program a student requires to receive FAPE.

F. Attorneys Fees

1. If the parent is a "prevailing party," he/she may be awarded reasonable attorneys' fees by a court.
2. Factors considered in calculating award of fees include:
    a) the reasonableness of the rate
    b) whether either party unreasonably protracted the resolution
    c) the time spent, and
    d) whether the parent was justified in refusing a settlement offer made 10 days or more prior to the hearing which was "more favorable" than the eventual decision.
3. If at the time the hearing is requested the parent refuses to provide notice to the district of the problems causing the hearing request and proposed solutions "to the extent known and available to the parents at the time," any potential request for attorneys' fees by the parents could be reduced or denied. 34 CFR 300.513.
4. An SEA or school district can recover from a court attorneys' fees from a parent's attorney who requests a hearing or starts a court action that is "frivolous, unreasonable, or without foundation" or continues to litigate after the litigation has become such.
5. Attorneys' fees can also be recovered from either the parent's attorney or the parent if the parent's request for hearing in subsequent court action "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." Sec. 615(i)(3)(B)(i).

DISCIPLINE "GROUND RULES"

GENERAL SITUATIONS

- May suspend for 10 school days or less (and provide no services, do no functional behavioral assessment (FBA), do no development/review of behavior intervention plan (BIP), nor do any manifestation determination.
- May suspend for more days above 10 without limit during the school year (but not if "change of placement" occurs, i.e., more than 10 consecutive school days or series of suspensions = pattern[1]). But must provide interim alternative educational service (IAES). [2]

SPECIAL SITUATIONS

Change of placement (i.e., more than 10 consecutive school days or series of suspensions = pattern)

- Not later than decision date give notice of decision and procedural safeguards notice to parent.
- Immediately or within 10 school days of decision date convene relevant members of IEP team for manifestation determination[3] (parent may appeal through expedited hearing).
- Develop IAES. [2]

Weapons/drugs/control substance situations/inflict serious bodily injury

- Without regard to manifestation determination.
- Not later than decision date provide notice of decision and procedural safeguard notice to parent.
- Administrator assigns to interim alternative educational setting (IAES)[2] for maximum of 45 school days.
- IEP team convened to determine IAES[2] (parent may appeal through expedited hearing).
- Immediately or within 10 school days convene an IEP team and other qualified personnel to do manifestation determination (parent may appeal through expedited hearing).

Note: The student's "stay put" is the IAES until the ALJ/HO decision or expiration of the expedited hearing deadline unless the parent and district agree otherwise.

Dangerous (i.e., likely to result in injury) situation:

- Not later than decision date provide notice of decision and procedural safeguards notice to parents.
- Immediately or within 10 school days of decision date convene relevant members of IEP team for manifestation determination. [3]
- Develop IAES.[2]
- District may seek from hearing officer (via expedited hearing) or court, a 45-school day IAES[2] (as proposed by school personnel consulting with the child's special education teacher) if:
  - The district shall demonstrate there is substantial likelihood of injury to child or others in current placement.
  - The IAES meets required criteria.[2]

Note: The student's "stay put" is the IAES until the ALJ/HO decision or expiration of the expedited hearing deadline unless the parent and district agree otherwise.

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[1] Pattern = a series of removals cumulatively more than 10 school days in a school year because of factors, e.g., length of each removal, total time removed, and proximity of removals to each other. Also, what the removal was for.
[2] IAES to enable student to progress in general curriculum (in different setting) and receive services/modifications in IEP to enable child to meet IEP goals and design to prevent behavior from recurring.
[3] Even if behavior is determined not a manifestation of a disability, IAES[2] must be developed.

MANIFESTATION DETERMINATION

"Relevant members" of IEP team make manifestation determination (parent may appeal through expedited hearing):

- Consider:
  - All relevant information in student's file, including IEP.
  - Teacher observations of the student.
  - Any information provided by parents.
- And determine:
  - If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
  - If the conduct in question was the direct result of the district's failure to implement the IEP.

DIVIDER

Dissecting Discipline and Related Issues Under the IDEA

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Structure of Presentation

- Major changes in 2004-05 IDEA reauthorization
- Simplified method for understanding removal rules
- Manifestation determinations
- Other issues (special offenses, law enforcement intervention, "stay-put")
- FBAs and BIPs

Key 2004-05 Changes

- Reform of MDR standard
- Additional special offense
- Modified "stay-put" application in discipline due process hearings
- Otherwise, minor changes, with longstanding doctrines remaining the same

Considering Unique Circumstances

- The IDEIA language
- Zero-tolerance angle…
- Reg clarifies discretion is subject to other discipline regs (not an end run around requirements)
- Examples of circumstances

Short-term removals (less than 10 consecutive days)

- LEA Authority remains same
- 10 "free" removal days (no IEP meeting, no services, no MDR, no change of placement procedures) per school year

  More than that is risky… More later

  Policy underpinnings

- **Services** still required after 10 total removal days (firm requirement that limits short-term removal options after the 10th day)
- **ISS/OCS** guidance reaffirmed—a great alternative to home suspension

  Must provide sufficient services…

- Partial day removals count
- Bus removals/suspensions

Accumulations of Short-Term Removals

- *Question*—At what point do accumulated short removals become a "big" removal (i.e., a disciplinary change in placement)?
- Always a fuzzy issue… And it may be exactly the way the rule is intended to be, as a limiting doctrine
- After 2004, but before the regs came out, this point was controversial, due to IDEA's silence

- **§300.536**—A change of placement if

  (1) behavior *substantially similar* to others in the series of removals, **and**

  (2) length of removals, total removal days, proximity of removals show a pattern (old factors)

DOE says similarity factor is important (but little guidance on application…)

School's determination subject to hearing

A Simplified Method to Understand the IDEA Disciplinary Removal Rules

- An attempt to condense the rules to their core
- Also, a different approach to presenting the rules to school staff and parents
- Rules apply under §504 also (USDOE guidance under §504 is really the original source of the doctrines)
- To have schools understand the rules, they must also understand the underlying policies

The Basic Method

1. Identify short-term disciplinary removals
2. Identify long-term disciplinary removals
3. Don't mix up the rules for each of above
4. For short-term removals, apply "free days" analysis, and don't push your luck once you reach a total of 10 in a school year
5. Before removals reach 10, have IEPT meeting
6. For long-term removals, conduct manifestation determination review

Identifying Short-Term Removals

- Occurs when a school administrator removes a student from their normal educational setting for discipline reasons for less than 10 school days
- Aside—ISS not a "removal" if services provided (sufficient for student to progress)
- Watch for lengthy office referrals…

Identifying Long-Term Removals

- Disciplinary removals of over 10 consecutive school days (usually for serious offenses)
- Usually, alternative disciplinary placements (IAES) and expulsions
- Always require prior manifestation determination and IEPT action
- Always require FAPE services during removal

The "Free Days" Analysis for ST Removals

- Schools allowed 10 "free" removal days per year for each IDEA student
- "Free" means no manifestation, FAPE, services, or other IDEA procedures required
- Meant to limit suspensions, and their negative effects on students (and emphasize BIP interventions), while allowing some removal

- Short-term removals over 10 total days require services
- After the 10-day mark, school is susceptible to the voluble and subjective "pattern" analysis
- Also may have to conduct MDR and FBA/BIP process (out of caution)
- Opens up FAPE arguments on appropriateness of BIP and behavioral supports
- Best for schools to keep it under 10 days

Preventative IEP Team Meetings

- Best for schools to have a meeting *before* short-term removals reach 10 in a year
- **Ideas for discussion**: FBA, BIP, BIP revision, sp. ed. counseling, psychological evaluation, class change, placement change, etc.
- Can save the district in a legal case…
- The point is to take program-based action

For Long-Term Removals, Conduct MDRs

- With serious removals, it's all about the manifestation determination
- Must take place before LT removal takes place
- **Primary rule**: removal can't take place if behavior is related to disability
- If no link, regular local/state procedures apply (including regular due process)

Discipline and §504

- Major doctrines apply equally (as far as USDOE is concerned…)
- Difference on drug/alcohol offenses
- §504-only students lose the protections of MDR and due process hearing if they violate rules on drugs/alcohol and they are "current users"
- Thus, there must be evidence of "current use"

Discipline and §504

- Some courts question the MDR requirement under §504, since it is in neither the statute or the regulations (see *Centennial Sch. Dist. V. Matthew L.* (E.D.Pa. 2008)
- But, OCR has required MDRs prior to disciplinary changes in placement under §504 in its guidance letters since at least the late 80's

Educational Services During Long-Term Removals

- FAPE required during long removals
- "Participation" in general curriculum
- Exact replication of services not needed—only to extent appropriate to circumstances
- Thus, a *modified* FAPE requirement
- An individualized approach to services

Educational Services During Long-Term Removals

- May become subject of more litigation (instead of the old attacks on the MDR, which are now more difficult)
- Can be a weak area—"cookie cutter" services, lack of key related services, lack of services on IEP, lack of counseling, limited hours
- A key IEPT duty in long-term removals

The New Special Offense of "Serious Bodily Injury"

- Added to drugs and weapons—students can be removed for 45 days if behavior related to disability (if not, regular discipline applies)
- Refers to *school* days
- Home could be the interim alternative setting
- *Super high standard* for "serious"

The New Special Offense of "Serious Bodily Injury"

- Standard is so high, it's almost superflous
- Should be reformed to a school-based context
- Schools often misunderstand the special offenses provision
- Watch the weapons provision with knives

Reform to "Stay-Put" in Discipline Cases

- Old "stay-put" in discipline cases
- Problem—Incentive to litigation…?
- 2004 change—in discipline disputes, "stay-put" is in *discipline* setting
- *But*, parents get expedited hearing

Manifestation Determinations—The 2004 MDR Reforms

- *Policy background*—Congress wanted a "raising of the bar" for MDRs
- Need for ***causal, direct, or substantial*** relation between behavior & disability
- Failures to implement IEP must ***directly result*** in behavior for a link finding

- "*Attenuated*" relationships, like low-self esteem arguments, are not enough
- Also, a desire to *simplify* MDRs (quite complicated under IDEA '97)
- Analysis of behavior across settings and time (an interesting new emphasis for MDRs)
- *Appropriateness* of IEP not an MDR issue, only implementation

Other Reforms

- **Burden of proof** is on parents in MDR challenges—now clear under DOE commentary and *Schaffer* (not clear before, among HOs)

  See Pennsylvania, Massachusetts, and Maryland cases to illustrate prior confusion on burden of proof

- Mainstream opinion on burden of proof: *Schaffer* means burden of persuasion is on **party seeking any type of relief**
- Issue of **MDR decision-makers**—no IEPT meeting required (but advisable! See *Philadephia City* (disagreement on selection of decision-makers))

  An area of flexibility that may create more problems than it's worth… Better to do MDRs in IEP team meetings

- **Return to placement if behavior related**

  Why the provision? To avoid campuses seeking educational changes in placement in lieu of disciplinary change in placement

  But, parents can agree on change as part of the modification of the BIP (school should document such agreements carefully)

  FBA/BIP process also required

When is the MDR Required?

- As with prior law, for disciplinary changes in placement (long-term removals of >10 consecutive school days)
- Also, when short-term removals get to be "too much" in a year (pattern of exclusion)

How is new MDR Different?

- Closer logical relationship between behavior and disability required now
- Compare to IDEA '97 provision (even slight links could support link finding)
- And, 1997 provision was obtuse—new formulation is more straightforward
- Harder to argue behavior related to IEP failures
- Already, fewer MDR cases

Modern MDR Forms

Basic Questions on Form:

1. Was behavior caused by, or directly and substantially related, to the disabilities?
2. Was the behavior the direct result of the school's failure to implement the IEP?

More Ideas for MDR Forms

- Is the behavior part of a ***pattern of similar behavior across settings and time***, or an isolated event?
- *Notice to parents*—Removals may be possible, even if linked, for offenses involving weapons, drugs, serious injury
- *Notice to parents*—"Stay-put" in case of hearing request is the discipline setting

Overall Guidance on MDRs

- Schools should prepare for the MDR
- Consult a psychologist in cases of students with ED or behavioral disorders
- IEPTs should sketch out their rationale
- IEPTs should explain their thinking clearly and succinctly
- *Common position*—behavior related to some degree, but not enough

- Does campus come to MDR with "clean hands"?
- Don't forget to review evidence on offense (details can really affect MDR)
- Possible shift to legal challenges to quality of services *during* removals (sometimes can be a weakness)

Modern MDs in Action

- **San Diego USD**

  Student claims his possession of sleeping pills at school was impulsive and thus related to ADHD

  Student had texted and talked to another about sharing the pills at school

  HO upheld school's no-link determination based on the student's long-term arrangements

- **District of Columbia v. Doe**

  HO agreed that 6th grade student's repeated misbehavior, including incident with substitute, was not related to disability

  But, HO found that the 45-day removal was excessive, and reduced it to 11-day suspension

  Court reversed HO, holding he had no jurisdiction over the disciplinary recommendation

- **San Diego USD**

  Student peripherally involved in sale of marihuana seeds

  For days, the student acted as "middleman"

  HO finds that student's skipping of medication, coupled with impulsivity when not on meds, meant IEPT should have found a manifestation

  Policy issue—Is this a healthy message?...

***MaST Comm. Charter Sch*.**

Student brings knife for protection, on various occasions

Parent submits new eval with new diagnoses (with scant support)

Panel finds behavior not impulsive or related to ADHD

Panel notes new diagnoses don't seem to meet *IDEA* eligibility model

Does a condition need to rise to level of IDEA eligibility, alone, to "count" for MD purposes?…

Is it possible to apportion multiple-condition ED situations?…

Why did it matter if behavior was related or not, if school only wanted 45-day removal for the weapon offense? Is this not **moot**?

See *Pemberton* case

R. S. v. Corpus Christi ISD (controlled substances, 30-day placement, mootness)

Fulton County Sch. Dist.

OHI student threatens to kill teacher

Team only addresses link to ADHD without addressing ODD, which they knew about

And, there was evidence of pattern of unfulfilled threats

Baltimore County Pub. Schs.

ED student shows up under influence of pot

Parent submits letter from therapist indicating that student has serious psychiatric conditions

But, letter does not comment on MD

HO says MD issue should be made with focus on the educational disability of ED, rather than individual diagnoses

But, is it possible to conduct MDR without looking at the conditions underlying the ED?…

Dearborn Heights

Parent argues excessive absences related to medical conditions, but provides no documentation

HO finds absences not related to LDs

Can't simply prevail by raising issue!

Scituate Pub. Schs.

Asperger's student having bad day, wants to go home, escalates by grabbing principal's necktie

School interprets tie as a "weapon"

HO says no dice—not readily capable of injury, and no "possession" (control)

But, behavior not related to disability, since it was purposeful, calm escalation

HO says no evidence of lack of understanding of consequences… (back to old thinking and old analysis?...)

Swansea Pub. Schs.

Student with ADHD, ODD wanted to call mom to pick him up on his cellphone

Gets highly agitated, threatens staffperson who picks up phone off the floor (after he threw it in crowded hall)

Staff says he de-escalated in the past, aggression not part of ADHD, ODD

HO says behavior related, staff did not provide him "opportunity to de-escalate"

HO relies on expert testimony, although expert never evaluated student, only reviewed records (highly irregular…)

Is the issue of ***staff*** conduct germane to the MD questions? What authority?

Okemos Pub. Schs.

- Boy with LD, ADHD is found selling or trading pot (various occasions)
- Parents claim impulsivity, but HO doesn't buy it, given timeframes
- At hearing, parents expert surprised the behavior involved *sale*, not use, of drugs

- When ADHD is involved, IEPTs should look at degree of motor planning, repetition, timeline involved in offenses
- The more of the above, the more the behavior is not impulsive

Muskegon Pub. Schs.

- Gang-involved student jumps on staff while they try to break up a gang fight
- No evidence that behavior related to LD
- HO admonishes parent for taking case to hearing ("disservice" to student)

Reports to Law Enforcement

- IDEA provision makes clear students are not immune from prosecution, and that schools may report offenses to law enforcement
- Be aware of what offenses merit reporting (dialogue with police), or talk with school police
- **Not** a behavior management technique
- School-to-prison "pipeline" debate

FBAs and BIPs

- **What is a Functional Behavioral Assessment?**
- No real definition in IDEA or regs
- Functional assessment of behavioral functioning relevant to BIP development
- Does not require an "expert"
- But, the better the FBA, the better the BIP

FBA Question Areas

- Prioritized behavior problems
- Frequency of behaviors
- Severity of behaviors
- Location (can be important)
- Antecedents
- Strategies already in use, effectiveness
- Consequences in use, effectiveness
- What happens after behavior

Is FBA required if no "link"?

- Regulations say no more need for FBA after long-term removal or MD finding
- But, the commentary states schools should use discretion in making decision to have FBA, develop BIP
- Let's think: if student is in this type of trouble, shouldn't we be proactive?…

Is FBA required after 10 days of short-term removals?

- Statute no longer requires FBA after 10 total days of accumulated ST removals
- But, again, the commentary states schools should use discretion in making decision to have FBA, develop BIP
- Let's think: if student has had so many removals, shouldn't we have already had FBA and BIP?…

Comments on BIPs

- Basic Question: When is a BIP needed?
- When behavior is recurring and impedes learning of student or others
- A proactive measure, best undertaken early (can't do it too early)
- Be careful in selecting BIP forms…
- BIPs should tie in with behavior G & O's

Common BIP Problems

- Not taking nature of disability into account
- Insufficient customization of consequences and reinforcers (reduces their effectiveness)
- Inappropriate implementation (and/or staff training)
- Simple lists of consequences—punishment-only formats
- Lack of positive strategies to prevent behaviors or promote acquisition of appropriate replacement behaviors

- Failure to revise ineffective BIPs
- Using minor modifications to regular code of conduct for complex cases
- Contingencies are not clear or specific
- Not enough contingencies
- Failure to address all target behaviors

Steps to Developing BIPs

- Gather data to conduct FBA
- Identify target behaviors (prioritize)
- Gather data on strategies and consequences
- Develop positive strategies to promote appropriate behavior
- Customize potential consequences

- Develop hierarchy or set of consequences
- Prepare draft BIP for IEP team discussion
- Solicit input from evaluating psychologist, consulting behavior specialist, etc, on tough cases
- Identify support services and training
- Evaluate effectiveness, monitor

Cases on BIPs

***Little Rock Sch. Dist*. (ARK 2002)**

Relied on parents, one-page form, resulted in a MRE

***Conroe Ind. Sch. Dist*. (TX 2002)**

Example of a good BIP for very difficult student

***Neosho R-V Sch. Dist*. (8th Cir. 2003)**

Way late in developing BIP

***Student with a Disability* (WI 2003)**

BIP can include consequences (even for behaviors related to disability)

And, school is ultimate decider…

***Mobile Co. Bd. of Educ.* (ALA 2004)**

Way late in developing BIP for student with multiple disabilities, behaviors

***Alex R.* (7th Cir. 2004)**

BIP appropriate, event though student ultimately escalated, needed MRE

Other Resources

- See Internet resources
- See BIP article
- Do your own research also
- Hard cases require more research

Dissecting Discipline and Related Issues Under the IDEA

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Major Changes to Discipline Under the 2004 IDEA Reauthorization

Policy Background

Few topics in special education generate as much debate and comment as the application of disciplinary rules to IDEA-eligible students. This is the reason why in 1997 the Congress saw fit to include in the IDEA specific provisions addressing discipline of IDEA students. *See* 20 U.S.C. §1415(k).

The balance between protecting the right to a FAPE by preventing arbitrary and discriminatory application of disciplinary rules on the one hand, while also affording schools the necessary discretion in implementing locally-designed disciplinary policies to maintain a safe learning environment, is still in evolution. *See* Congressional Research Service (CRS) Report for Congress, at p. 29. The persistence of the debate resulted in significant legislative attention to the issue in the 2004 reauthorization. The Congress also showed early that it was more than willing to undertake reform of the discipline provisions. The House of Representatives, for example, passed an IDEA bill that would have essentially repealed the manifestation determination requirement, allowing schools to use regular disciplinary procedures for removals of up to 45 days, or longer if state law so required. The Senate's IDEA bill revised its language, but retained the manifestation determination requirement as a fundamental component of disciplinary actions under the Act. The bills demonstrated that the issue was among the most hotly debated in the legislative process leading up to reauthorization.

Key Amendments

The reauthorized discipline provisions effect significant reform in three major areas: manifestation determination, the special 45-day removal offenses, and "stay-put" in discipline contexts. The Congress also revised some awkward language from the 1997 reauthorization (which was the first to include

provisions governing student discipline), although much major substance from 1997 appears to remain. Some other more minor changes were also effected to the hearing officers' 45-day removal sections, provisions on students not yet IDEA-eligible, the trigger for Functional Behavioral Assessments (FBAs), and returns to placement in cases of behavior related to disability, among others. The new provisions, however, leave open some questions that will require regulatory clarification or additional guidance from the Department of Education (USDOE).

Considering Case-by-Case Circumstances in Ordering Removals

At the inception of the disciplinary process, a school administrator must decide whether to pursue a disciplinary removal in response to a student's behavioral offense. The final discipline provisions state that "school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a student with a disability who violates a code of student conduct." §1415(k)(1)(A).

Purpose of provision—The language may be in response to the advent of state or local "zero-tolerance" policies, under which school principals were required to order alternative placements or expulsions in response to certain student offenses without regard to any unique circumstances. IDEA now specifically allows a school administrator to consider any unique circumstances, case-by-case, in deciding whether to order or recommend a long-term disciplinary removal of a student with a disability. A school principal may therefore decide not to recommend a long-term removal of a 7-year-old student with mental retardation who pushed his teacher while having a tantrum, even if a local "zero-tolerance" policy would otherwise mandate a long-term removal for assault on staff, without consideration of case-by-case circumstances.

Confusion surrounded this provision, as some feared it allowed school administrators to use case-by-case discretion in ordering disciplinary changes in placement without regard to the standard protections contained in the Act. The final regulations have alleviated this concern. The new regulation restates the language of the Act's provision, but adds a comma clause that makes clear that in making case-by-case determinations and considering unique circumstances involving discipline, schools must nevertheless act in a manner "consistent with the other requirements of this section." 34 C.F.R. §300.530(a). Thus, the regulation makes clear that the provision never was intended to allow an end-run around the otherwise applicable requirements of the law with respect to disciplinary changes in placement. The commentary states that "section 300.530(a), consistent with section 1415(k)(1)(A) of the Act, clarifies that, on a case-by-case basis, school personnel may consider whether a change in placement, that is otherwise permitted under the disciplinary procedures, is appropriate and should occur. It

does not authorize school personnel, on a case-by-case basis, to institute a change in placement that would be inconsistent with §300.530(b) through (i), including the requirement in paragraph (e) of this section regarding manifestation determinations." 71 Fed. Reg. 46,714 (August 14, 2006)(hereinafter cited "Fed. Reg. XXXXX").

Additionally, the commentary informs schools that "factors such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of a school code could be unique circumstances considered by school personnel in determining whether a disciplinary change in placement is appropriate for a child with a disability." Fed. Reg. 46,714.

Return to Placement If Behavior Related to Disability

If the manifestation decision-makers determine that a child's behavior was related to their disability, the IEP team is to "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan." §1415(k)(1)(F)(iii).

> *Practical Implications*—This language appears to prevent IEP teams from deciding to change the child's placement to a more restrictive educational setting (not a disciplinary placement) after conducting the manifestation determination, unless the parents agree. This will affect schools in states that allow the IEP team to implement educational changes in placement over parental disagreement, as they will not be able to do so in post-manifestation contexts.
>
> *Agreements on Disciplinary Removals*—The new law codifies the option of parents and schools reaching agreement on a disciplinary change in placement, even in situations where it is determined that the behavior was related to disability.

Authority for Short-Term Removals (<10 consecutive school days)

The new law reaffirms that the manifestation determination requirement and framework does not apply to situations where school personnel remove students for not more than 10 days (i.e., short-term removals). §615(k)(1)(E). As in 1997, the statute does not include a provision addressing accumulations of short-term removals of less than 10 days. S*ee* former 20 U.S.C. §1415(k)(1)(A)(i).

The 2006 regulations reiterate the longstanding authority of schools to undertake disciplinary removals of students with disabilities of less than 10 school days, and to repeat such removals for additional offenses, without following the change of placement procedures, as long as the accumulation of short-term removals does not constitute a change in placement. 34 C.F.R. §300.530(b)(1). The regulation also reasserts the provision in the 1999 regulations that requires the provision of educational services after a total of 10 removal days in a school year. 34 C.F.R. §300.530(b)(2); see also 34 C.F.R. §300.530(d) on the services requirement.

The commentary clarifies that the authority conferred upon schools would not allow "using repeated disciplinary removals of 10 school days or less as means of avoiding the change in placement options in §300.536." Fed. Reg. 46,715. But, the commentary adds that "it is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a discipline infraction for a short period of time, even though the child already may have been removed for more than 10 school days in that school year, as long as the pattern of removals does not itself constitute a change in placement of the child." Id. As to the provision reasserting the services requirement after a total 10 days of removal in a school year, the commentary states that "discipline must not be used as a means of disconnecting a child with a disability from education." Id.

In-school suspension not part of removal days—The USDOE reasserts the position it took in the 1999 commentary with respect to use of in-school suspension. It states that "it has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy." Fed. Reg. 46,715.

Partial day suspensions—As with ISS, USDOE reasserts its 1999 position, stating that "portions of a school day that a child had been suspended may be considered as a removal in determining whether there is a pattern of removals as defined in §300.536." Fed. Reg. 46,715. Thus, schools cannot ignore accumulations of partial-day suspensions in counting removals for purposes of the 10-day rule.

Bus suspensions—Here again, USDOE restates its longstanding position, stating that "whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If

the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension under §300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension is not a suspension under §300.530. In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus." Fed. Reg. 46,715. Thus, if special transportation, for example, is included as a related service on the IEP, a suspension from the bus would count as a suspension from school, unless the school provides some alternative means of transportation. If the child rides the regular bus, and that service is not a part of the IEP, then a bus suspension does not count as a suspension from school. The Department, however, cautions schools to address misbehavior on the bus as a part of the child's IEP. "Public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." Fed. Reg. 46,715.

Accumulations of Short-Term Removals

As in 1997, the 2004 statute does not include a provision addressing accumulations of short-term removals of less than 10 days. *See* former 20 U.S.C. §1415(k)(1)(A)(i). Given that the Act also prohibits the Department of Education from promulgating any regulation that adds to the statutory requirements, a question emerged after reauthorization as to whether the long-standing guidance and 1999 regulation limiting accumulations of short-term removals constituting a pattern of exclusion would survive the reauthorization and rule-making process. *See former* 34 C.F.R. §300.519(b). That regulation defined a disciplinary change of placement as including "a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another."

The new regulation—Under new section 300.536, a change of placement on the basis of accumulated short-term removals occurs if—

(1) the removal is for more than 10 consecutive school days; or

(2) the child has been subjected to a series of removals that constitute a pattern—

(i) because the series of removals total more than 10 school days in a school year;
(ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
(iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Thus, in addition to the familiar factors in §300.536(a)(2)(iii), the new provision requires analysis of the similarity of the behaviors that have led to the series of removals. And, it appears that all the criteria in §300,536(a)(2) must be simultaneously present in order to support a finding that a series of removals amounts to a "pattern of exclusion" change in placement. In other words, a finding of a "pattern of exclusion" change in placement requires that (1) the series of removals total over 10 school days, (2) the behaviors in the series be substantially similar, and (3) the old factors (length of removals, total removal, and proximity of removals) are indicative of a pattern. The new regulation is also cleaner and clearer in language. *See* Fed. Reg. 46,729.

Substantial similarity of behaviors in a series—The commentary emphasizes the importance of determining whether the behaviors underlying a series of removals are substantially similar in nature. "We believe requiring the public agency to carefully review the child's previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions." Fed. Reg. 46,729. The Department concedes, however, that the provision requires a "subjective" determination. Id. The commentary includes no examples of an application of this provision to assist in ascertaining the level of specificity required in the analysis.

A Simplified Method for Understanding Disciplinary Removal Doctrines under the IDEA

The IDEA rules governing disciplinary actions of IDEA-eligible students regulate actions that constitute removals from school due to application of local disciplinary policies and/or codes of conduct. Other forms of disciplinary action that do not involve removal of students are not addressed in IDEA, but are left up to the discretion of local school systems. Because of the way the rules have evolved, from USDOE letters and guidance documents in the 1980's, to the first actual statutory provisions in IDEA 1997, and their retuning in the 2004

reauthorization, they can be confusing and difficult to explain. The approach below represents an attempt to condense the doctrines into the simplest "common denominator" concepts that schools must understand to answer common questions about disciplinary removals of special education students.

1. Learn to identify a short-term disciplinary removal under IDEA.

A short-term removal occurs when a campus administrator removes a child from his normal setting for less than 10 consecutive school days for disciplinary purposes. The most common example is a suspension to the home. In-school suspension (ISS) should be considered a short-term removal, unless the "smart ISS" criteria discussed below is met, in which case the removal days might not "count."

2. Learn to identify a long-term disciplinary removal under IDEA.

A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to a interim alternative education setting or expulsion.

3. Do not mix up the rules for long-term and short-term removals.

It's easy to get confused if you try to learn and apply the separate rules for long and short-term removals as simultaneous concepts. Rather, learn and apply these rules as two separate sets of rules. This eliminates a lot of mixed-up IDEA discipline questions, such as "is it 10 cumulative or 10 consecutive days?" There are really two sets of 10-day rules, but trying to learn them simultaneously frequently causes confusion.

4. For short-term removals, apply "free days" analysis, and don't push your luck after reaching 10 total removal days in a school year.

At the start of the school year, imagine the school is given 10 "free" removal days for each IDEA student. These days are "free" under IDEA because they can be used without an IEP team meeting, without a functional behavioral assessment (FBA), without a manifestation determination, without educational services, and basically, without worrying about any IDEA procedure or safeguard. They can be imposed as they would in the case of a similarly situated nondisabled student.

But, after the "free" days are used up with short-term removals, they will "cost" you in compliance with IDEA procedures and additional requirements. For starters, for any short-term removal after the 10th,

educational services must be provided to the student. Moreover, at a certain point, accumulations of too many short-term removals will become a "pattern of exclusion" (in USDOE lingo), which consists of an overall long-term removal that requires compliance with the long-term removal IDEA rules discussed below. In addition, USDOE also suggests that upon 10 total days of removal, the IEP team would be well-advised to conduct a FBA and develop a BIP (or revise an existing BIP). Also, even the most rule-conscientious campus is subject, after too many removals, to a finding that the excessive short-term removals are in fact a sign that the IEP is simply not working. These situations can thus evolve from pure discipline matters into actual denial-of-FAPE claims. Generally, it's good advice for schools to limit forays into the over-10-total-school-days danger zone. And, obviously, the higher the number of short-term removals after the 10-day total is reached, the more precarious the legal position.

5. Before short-term removals add up to 10 total school days, have an IEP team meeting to address behavior.

The best preventive measure in IDEA disciplinary matters is to convene an IEP team meeting *before* short-term removals add up to 10 total days. The IEP team can decide to conduct a FBA, develop a BIP, add counseling, evaluate the student further, vary other IEP services, change the student's placement, or make other adjustments to the student's program. The idea is to take action before a disciplinary issue becomes a problem. Hearing Officers tend to have little patience for schools that take no measures prior to removing the child a total of 10 days, but then seek to defend significant removals after the 10-day mark is reached.

6. For long-term removals, proceed to manifestation determination IEP team meeting as soon as possible, and before the removal reaches 10 consecutive school days.

As soon as possible after the campus initiates a long-term disciplinary removal, an IEP team meeting must be convened to conduct a manifestation determination. The meeting must definitely take place before the long-term removal reaches its 10th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is the primordial safeguard of the IDEA disciplinary procedures. It is a doctrine that was first espoused in court cases starting in the late-70's, later adopted by the Department of Education as policy in the 80's, and finally codified into IDEA and its regulations in the late 90's.

> The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the IEP team properly determines that the behavior in question is **not** related to disability, then the student can be subjected to regular disciplinary procedures and regular removals, as in the case of a similarly-situated nondisabled student. If the IEP team determines that the behavior **is** related to disability, then a long-removal cannot take place (with the exception of the special offenses listed in IDEA).

Educational Services During Disciplinary Removals

As in prior law, a finding that the behavior was not related to disability allows the school to follow and impose regular disciplinary procedures and removals, but while also continuing to provide students with a FAPE in the disciplinary setting with a focus on services enabling the child to participate in the general curriculum. §1415(k)(1)(C).

The provision states that, irrespective of the manifestation determination, a child with a disability removed for disciplinary reasons must continue to receive educational services "so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." §1415(k)(1)(D)(i).

> The language was revised from stating that the services provided during removals must "enable the child to meet the goals" of the student's IEP, to requiring that the services enable the student "to *progress* toward meeting the goals set out in the child's IEP." *Compare* §1415(k)(3)(B)(i) to new §1415(k)(1)(D)(i).
>
> Irrespective of the change, it appears that the statute continues to require a FAPE during long-term removals, although apparently allowing the provision of different types of services and accommodations than under the pre-discipline placement, as long as they lead to progress on the IEP goals and allow appropriate participation in the general curriculum.
>
> *Future Implications*—Given the tightening of the manifestation determination standard, it should be expected that a greater number of students' behaviors will be found to not be a manifestation of disability. Thus, schools should also expect greater levels of scrutiny over the nature, quantity, and quality of services provided during the removal (also in light of the revision to the stay-put requirement in the context of discipline disputes, as discussed below).

The 2006 regulations restate the Act's requirement that students be provided a FAPE even during periods of long-term disciplinary removals. 34 C.F.R. §300.530(d)(1); §§1412(a)(1)(A), 1415(k)(1)(D)(i). Indeed, the commentary plainly states "on the eleventh day cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided…" Fed. Reg. 46,717.

Does participation require exact replication of services?—USDOE takes the position that exact replication of services is neither required, nor, in many cases, possible. "We caution that we do not interpret "participate" to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities." Fed. Reg. 46,716. Put in other words, USDOE interprets the statute as requiring that services during long-term disciplinary removals be provided in conformity with the child's IEP "to the extent appropriate to the circumstances." Id.

A "modified" disciplinary FAPE requirement—The USDOE clarifies that the concept of FAPE during a long-term disciplinary removal is a "modified" one, due to the potential differences in the settings and services available in disciplinary placements, as opposed to those on regular campuses. The commentary states that "while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP." Fed. Reg. 46,716.

Individualized approach to during-discipline services—The USDOE highlights that the services provided to students with disabilities properly placed in disciplinary settings will vary depending on the students' disabilities and consequent educational needs. "Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the

amount of services that would be necessary to enable a child with a disability to appropriately participate in the general curriculum and progress toward achieving the goals on the child's IEP may be different if the child is removed from his or her regular placement for a short period of time. For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under §300.530(g) or §300.532 and not performing at grade level." Fed. Reg. 46, 716.

The Special Offenses under IDEA '97 and '04

In the 1997 version of IDEA, Congress decided that even if an offense involving drugs/controlled substances or a weapon were related to a special education student's disabilities, the school could nevertheless remove the student to an alternative educational setting for a maximum of 45 calendar days (now school days, as shown below). If, however, the offense was *not* related to the disability, the student could be subjected to the school's regular disciplinary procedures, including long-term removal to an interim alternative educational setting (depending on local policy and state law). As an aside, schools should not consider this an "automatic" removal, since a manifestation determination is nevertheless necessary, and the IEP team must also plan for serving the student in the disciplinary placement.

The 2004 reauthorization of IDEA retained the provision, but added inflicting "serious bodily injury upon another person" to the list of special offenses. §1415(k)(1)(G)(iii).

> *High Definition*—Serious bodily injury is defined strictly, as that which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. §1415(k)(7)(D); 18 U.S.C. §1365(h)(3). Thus, it appears that the statute focuses only on the most severe types of assaults possible.
>
> *45-school-day timeline*—The new provision specifies that the 45-day removal timeline refers to "school days" rather than calendar days. §1415(k)(1)(G); CRS Report, at 30. Ostensibly, this means that a 45-day removal begun at the end of a school year could be completed at the beginning of the next. Holidays and weekends would also not serve to reduce the actual time served in a disciplinary setting.

Reform to "Stay-Put" in Discipline Disputes

The new law changes the application of the "stay-put" requirement with respect to changes in placement due to disciplinary action. Specifically, when a an IDEA hearing is initiated to challenge a disciplinary action, either by the parent to challenge an action, or by a school to seek a removal to an interim disciplinary setting, "the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or the expiration of the disciplinary placement term, whichever occurs first." §1415(k)(4)(A); CRS Report, at 31.

Compare to Prior Law—Under previous law, unless the behavior involved a drug or weapon offense or the school sought a 45-day extraordinary removal from a hearing officer, the "stay-put" provision required that the student remain in his "pre-discipline" placement pending the decision of the hearing officer. *See* previous 20 U.S.C. §1415(k)(7)(A) & (B). The new law makes the disciplinary setting the "stay-put" placement if the parent requests a hearing to challenge the placement or manifestation determination.

Right to Expedited Hearing—In light of the change, the law also requires that this type of hearing be "expedited," meaning that it take place within 20 school days and result in a decision within 10 school days thereafter. §1415(k)(4)(B).

Policy Background—The likely policy source of the "stay-put" reform is two-fold: (1) legislative recognition of the need to enable schools to promote and maintain safer learning environments, and (2) the need to remove the incentive to litigation presented naturally by the prior application of the "stay-put" provision to discipline disputes. Simultaneously, however, the Congress acted to ensure that parents are afforded an expedited procedure to challenge school disciplinary changes in placement.

Manifestation Determinations

The 2004 Reform of the Manifestation Determination Standard

In 2004, the Congress undertook several revisions and reforms to the rules of discipline of students with disabilities. Part of the reforms touched on the requirement for manifestation determinations or manifestation determination reviews (MDs or MDRs) prior to long-term disciplinary removals of IDEA-eligible students. As seen below, the requirement itself remains, but Congress

revised and simplifies the standard under which schools determine whether a behavior is related to disability. Although an apparently subtle change, the new formulation is in fact a significant departure from the prior manifestation determination inquiry.

The revised statutory language—Congress tightened the language and structure of the manifestation determination standard, in essence "raising the bar" of the standard required to show that a behavior is a manifestation of disability. If a school decides to change a student's placement due to a disciplinary offense, "the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency), shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

> **if the conduct in question was *caused by, or had a direct and substantial relationship to*, the child's disability; or**
>
> **if the conduct in question was the *direct result* of the local educational agency's failure to implement the IEP."** 20 U.S.C. §1415(k)(1)(E)(i).

Legislative Background—The Conference Committee to IDEA 2004 stated that its intention in reforming the provision was that schools determine whether "the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability." *Conference Committee Report*, at 225. The commentary to the regulations cites and quotes this significant guidance. *See* 71 Fed. Reg. 46,720.

The 2006 regulation—The final regulation at 34 C.F.R. §300.530(e) restates the statutory language without elaboration.

A desire to simplify MDRs—The USDOE also reads the reformed provision as an attempt to simplify the MDR process. The commentary to the regulation states "the revised manifestation determination provisions in section 615 of the Act provide a simplified, common-sense manifestation determination process that could be used by school personnel." 71 Fed. Reg. 46,720 (August 2006)

Guidance on making the determination under the new standard—The Conference Committee report on IDEA 2004 also provides additional guidance that Congress intended that the manifestation determination "analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability." *Committee*

Report, at 224. The USDOE commentary to the regulations in fact quotes this very language. *See* 71 Fed. Reg. 46,720. This suggests that it is appropriate to examine patterns of behavior, the lack thereof, the setting where the behaviors take place or not, in making the determination. Ostensibly, if a behavior is caused by or directly related to disability, one should expect to see it across different settings and times.

Implementation of IEP vs. Appropriateness of IEP—Unlike the 1997 law, the new IDEA manifestation provision does not contain language about whether schools must examine the appropriateness of the child's IEP while undertaking the manifestation determination. This raised questions about whether the omission was intentional and/or meaningful from a substantive standpoint. In response to comments on this point, the USDOE clarified that "the Act no longer requires that the appropriateness of the child's IEP and placement be considered while making a manifestation determination." 71 Fed. Reg. 46,720. Rather, as part of the manifestation determination, schools must focus on whether there has been a failure of implementation of the IEP that directly resulted in the misbehavior. Id. And, if the manifestation determination decision-makers find that an implementation failure has directly resulted in the behavior, a new subsection requires that the school take "immediate steps" to remedy the deficiencies. 34 C.F.R. §300.530(e)(3); *see also* 71 Fed. Reg. 46,721.

Burden of proof in challenges to manifestation determinations—Several commenters asked USDOE to issue a regulation imposing the legal burden of proof on schools of showing a finding of "no link" was proper when parents challenge the determination. Referring to the Supreme Court's decision in *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the USDOE disagreed, stating that "the Supreme Court determined in *Schaffer* that the burden of proof ultimately is allocated to the moving party." 71 Fed. Reg. 46,724. Thus, the position of the Department is that a parent who challenges a school's findings in a manifestation determination (i.e., the party seeking relief, or the "moving" party) bears the burden of proof in administrative proceedings under the IDEA per the *Schaffer* decision. This guidance will hopefully end the caselaw inconsistencies among hearing officers in assigning burden of proof in cases of challenges to manifestation determinations.

> *Prior burden of proof confusion*—Prior to the 2006 regulations, with their accompanying clarifying commentary, there was some difference of opinion on the burden of proof formulation with respect to MDs. Some hearing officers and review panels felt that the Supreme Court's opinion in *Schaffer v. Weast*, which placed the burden of proof on parties challenging the existing educational program, was limited to challenges to IEPs. These administrative officers thus felt the issue of burden of proof in

MD challenges was an "open question." See, e.g. *MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006); *Philadelphia City Sch. Dist.*, 47 IDELR 56 at n. 32 (SEA Pennsylvania 2007). The majority opinion in *Schaffer*, however, expressly states that "[a]bsent some reason to believe that Congress intended otherwise,…we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." Moreover, the opinion questioned any burden of proof formulation that would presume an inappropriate IEP or violation of IDEA unless proven otherwise. Thus, other hearing officers interpreted *Schaffer* as clarifying the burden of proof issue in IDEA cases in general, since it placed the burden of persuasion on the party seeking relief or change in status quo. *Baltimore County Pub. Schs*., 46 IDELR 179 (SEA Maryland 2006)(noting that the IDEA provision on MDs is silent on any unique treatment or shifting of burden of proof in MD challenges); *Scituate Pub. Schs.*, 47 IDELR 113 at n. 4 (SEA Massachusetts 2007)("party seeking relief with respect to a particular claim has the burden of persuasion regarding that claim").

Manifestation Determination Decision-Makers

Decision-making process flexibility—While IDEA '97 required the IEP team and other qualified personnel to conduct the manifestation determination, the new law states that it is to be conducted by the school, the parent, and "relevant members" of the IEP team. 20 U.S.C. §1415(k)(1)(E)(i). There is no mention of a meeting requirement to actually undertake the MD, although the law still requires the IEP team to convene to actually determine the interim alternative education setting and the services to be provided during the long term removal. 20 U.S.C. §1415(k)(2). Legislatively, the origin of this provision is likely related to other provisions of IDEA 2004 reflecting Congress' concern over the high numbers of IEP team meetings that take qualified staff away from their respective instructional assignments. The final regulation implementing this provision restates the statutory language, and emphasizes that the school and parents mutually determine the relevant members of the IEP team that must make the MD. 34 C.F.R. §300.530(e).

Practical considerations—The flexibility offered by the Congress also means that there can be disputes over determining the "relevant" members of the IEP team. For example, in a Virginia case, parents of a child with emotional disability challenged the makeup of the MDR team, although both the hearing officer and a district court rejected their argument that they had an "equal right" to determine the members of the MDR team. *Fitzgerald v. Fairfax County Sch. Bd*., 50 IDELR 165 (E.D.Va. 2008). The court held that the provisions of the IDEA addressing the composition of the

MDR team meant that the school determines the school staff's members and the parents may determine whom else they wish to invite in addition. In the case of *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007), an appellate panel overturned a school's MD, in part due to the fact that "the District did not provide the parents with the opportunity to engage in a mutual determination of relevant members of the Student's IEP team." See also, *In re: Student with a Disability*, 107 LRP 63721 (SEA Virginia 2007)(dispute over selection of relevant members, degree of participation). In a more recent case, a parent successfully challenged a MDR on the basis that the notice did not properly notify her of her right to invite relevant members of the IEP team. *Cherry Creek Sch. Dist. #5*, 56 IDELR 149 (SEA Colorado 2011). And there are still more questions: exactly how much opportunity must be provided to parents to provide input on members? What if there are disagreements on membership? To what degree must each member participate? To avoid problems and confusion, many schools choose to continue to conduct MDs in properly scheduled and constituted IEP team meetings.

Return to Placement If Behavior Related to Disability

If the manifestation decision-makers determine that a child's behavior was related to their disability, the IEP team is to "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan." 20 U.S.C. §1415(k)(1)(F)(iii). The new regulations restate this provision at section 300.530(f)(2). They also clarify that in situations of manifestation, IEP teams must conduct a functional behavioral assessment (FBA), if one has not been done already, and implement a behavior intervention plan (BIP). 34 C.F.R. §300.530(f)(1)(i). If a BIP is already a part of the child's IEP, then the IEP team must review the BIP and "modify it, as necessary, to address the behavior." 34 C.F.R. §300.530(f)(1)(ii).

"Stay-Put" Exception in Discipline Disputes

Another reform included in the 2004 IDEA reauthorization was a change to the application of "stay-put" in discipline disputes. Generally, the "stay-put" provision of IDEA requires that a student's current placement be maintained (i.e., "stay-put") while legal action is pending, unless the parties agree otherwise. 20 U.S.C. §1415(j); 34 C.F.R. §300.518. When applied to disputes over disciplinary placements prior to 2004, this meant that a school had to return a child to their pre-discipline placement while any litigation was pending regarding the manifestation determination or disciplinary placement. In 2004, the Congress modified the "stay-put" provision so that a student subject to disciplinary

placement must now remain in the disciplinary placement while the legal action was pending, unless the parties agree otherwise, and until either the disciplinary term runs out. 20 U.S.C. §1415(k)(4)(A); 34 C.F.R. §300.533. A due process hearing to decide a dispute over disciplinary placement or manifestation determination, however, is subject to an expedited hearing procedure. 34 C.F.R. §300.532(c).

> *Comment*—The creation of an exception to the "stay-put" provision in disciplinary placement situations has significantly changed the tactical landscape in IDEA discipline disputes and litigation. Under the old formulation, if parents of a student facing alternative placement or expulsion filed a due process hearing request, the filing acted as a stay of the disciplinary action, at least until the hearing officer issued a decision. That tactical advantage is gone now, replaced by an expedited hearing process.

Practice Point 1—When is the MDR Required?

> **As under prior law, manifestation determinations are required before schools undertake disciplinary changes in placement of IDEA-eligible students.**

The point at which the manifestation determination requirement is triggered is unchanged—MDs are still required when a school decides to engage in a disciplinary change in placement of an IDEA student. The most common form of disciplinary change in placement is a removal of more than 10 consecutive school days (usually in the form of a removal to an interim disciplinary setting or expulsion). *See* 34 C.F.R. §300.536(a)(1).

> The requirement for a MD in cases where a school recommends a long-term disciplinary removal (i.e., disciplinary change in placement), moreover, applies whether the behavior in question takes place on school grounds or not. See, e.g. *Delaware Dept. of Educ.*, 53 IDELR 340 (SEA Delaware)(MDR was required although underlying behavior that led to recommendation for disciplinary placement took place off school grounds). This is important, as a variety of states have laws calling for school disciplinary actions for certain off-campus offenses.

The "Pattern of Removal" Change in Placement—The other form of disciplinary change in placement is a "pattern of exclusion" or "pattern of removal" change in placement, where a school engages in a series of short-term removals, each of which is less than 10 consecutive school days in length, but when viewed collectively, amount to a disciplinary change in placement. The

problem with series of short-term removals is that it is not precisely clear when the next short-term removal—once the school has already removed a student more than 10 days in the school year—renders the overall series of removals a "pattern of exclusion." A multi-part federal regulation promulgated in 2006 addresses this issue.

> *The 2006 regulation*—Under section 300.536(a)(2), a disciplinary change of placement on the basis of accumulated short-term removals occurs if—
>
> the child has been subjected to a series of removals that constitute a pattern—(i) because the series of removals total more than 10 school days in a school year; (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.
>
> In subsection (iii), the regulation restates longstanding USDOE guidance on the factors that make a number of short-term removals "become" a pattern of removal that constitutes a long-term removal. But, in addition to the familiar factors in §300.536(a)(2)(iii), the new provision requires analysis of the similarity of the behaviors that have led to the series of removals. And, it appears that all the criteria in §300,536(a)(2) must be simultaneously present in order to support a finding that a series of removals amounts to a "pattern of exclusion" change in placement. In other words, a finding of a "pattern of exclusion" change in placement requires that (1) the series of removals total over 10 school days, (2) the behaviors in the series be substantially similar, and (3) the old factors (length of removals, total removal, and proximity of removals) are indicative of a pattern. The new regulation is also cleaner and clearer in language than its predecessor (or the cryptic proposed regulation). *See* 71 Fed. Reg. 46,729.
>
> *Substantial similarity of behaviors in a series*—The commentary emphasizes the importance of determining whether the behaviors underlying a series of removals are substantially similar in nature. "We believe requiring the public agency to carefully review the child's previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions." 71 Fed. Reg. 46,729. The Department concedes, however, that the provision requires a "subjective" determination. *Id*. The commentary

includes no examples of an application of this provision to assist in ascertaining the level of specificity required in the analysis, and few cases have emerged on this point. In *East Metro Integration District #6067*, 110 LRP 34370 (SEA Minnesota 2010), the Minnesota Department of Education held that a district did not violate the IDEA in failing to hold a MDR for a series of removals because the underlying behaviors were not substantially similar (theft, weapon possession), and therefore, there was no pattern of removals.

Additional guidance—The final regulation also clarifies that it is the school that must determine, on a case-by-case basis, whether a pattern of removals constitutes a change of placement. 34 C.F.R. §300.536(b)(1). It also confirms that the determination is subject to review through due process and judicial proceedings. 34 C.F.R. §300.536(b)(2); *see also* 71 Fed. Reg. 46,729-30.

Practical Guidance—Based on the foregoing regulatory language and commentary, some schools may limit themselves to no more than 10 total school days of short-term removals per school year, if at all possible. Clearly, the regulations allow for more than 10 short-term removal days in a school year, but the determination of when removals past the 10-day mark reach the point of becoming a "pattern" depends on multiple and potentially complicated factors. The spirit of the regulations, moreover, would support continued review and revision of positive behavioral interventions and supports, other changes to IEP services, or consideration of educational placement options, rather than engaging in continued short-term removals.

Practice Point 2—How is the new MDR different?

The new manifestation determination questions require a closer logical relationship between behavior and disability to make a finding of manifestation than under the 1997 version of the law.

Under IDEA 1997, for a behavior to be found related to disability, all that was required was for the disability to have impaired the child's ability to understand the impact and consequences of the behavior, or to have impaired the child's ability to control the behavior, to *some* degree. The 2004 Congress decided that this was too low of a threshold. Under the new law, a behavior is deemed related to disability only if *caused by* the disability, or *directly and substantially* related to the disability.

Similarly, a behavior is deemed related to a school's failure to implement the IEP only if the implementation failure *directly resulted* in the misbehavior. This new formulation does not require consideration of the appropriateness of the IEP, only whether it has been implemented, and if not, whether the failure to implement directly resulted in the misbehavior in question.

Thus, modern MDs require use of updated forms that reflect the modern manifestation determination questions. Modern MD forms must, at the least, ask the following questions:

1. Was the misbehavior caused by, or directly and substantially related to, the student's disabilities?

2. If the school failed to implement the student's IEP, was the misbehavior the direct result of the school's failure to implement the IEP?

Ideas on MDR Forms—Given the guidance of the Conference Committee, it may also be wise for schools to examine past disciplinary incidents in making a manifestation determination, to determine if there is a pattern of similar behavior across settings and time. Thus, MDR forms might include information on whether a pattern of similar behavior exists in the student's history. In addition, some schools are also including notes in MDR forms that clarify to parents that even if a drug, weapon, or serious bodily injury offense is determined to be a manifestation of disability, the student may be placed in an interim alternative educational setting for up to 45 school days. Also, the revised forms may warn parents of the new "stay-put" formulation in cases of challenges to disciplinary actions.

Modern Manifestation Determinations in Action

In the case of ***Los Angeles Unified Sch. Dist.*, 111 LRP 60703 (SEA California 2011)**, a teen with ADHD was unable to convince a hearing officer that his sale of prescription drugs (Adderall) was related to his disability. Considering a variety of sources of information, the school found that the student initially planned the details of the sale with another student, went home, and brought the drugs back the next day to conduct the sale. The hearing officer agreed with the school staff that the behavior was not impulsive, but rather "planned and deliberate." The impulsive behavior seen by the school, moreover, involved fighting, outbursts, and disruption, rather than the behavior exhibited in this instance. "Student's conduct demonstrated poor judgment, but the evidence did not demonstrate that Student's poor judgment was a manifestation of his disability as opposed to a manifestation of Student's youth, or need for

money, or of any other non-disability-related rationale for engaging is such conduct."

The impulsivity argument also did not help another high school student from Massachusetts who was facing additional removal due to an off-campus felony car break-in. ***Medford Public Schs.*, 110 LRP 31566 (SEA Massachusetts 2010)**. The hearing officer agreed with school staff that the circumstances of the nighttime car break-in involved careful planning and preparation, including arranging for a disguise and attempting to set up an alibi. With respect to the school behaviors, staff indicated that he enjoyed the "drama" of misbehavior and often planned his conduct to achieve maximum exposure and effect. Although a private psychologist wrote to the school arguing that the behaviors were in fact related to executive function deficits, there was no evaluation record of such deficits, the psychologist had not conducted an evaluation, he had limited contact with the student, and no knowledge of the nature of the underlying behaviors.

A school's failure to properly document in MDR process and explain its conclusions led a New York hearing officer to overturn its determination. ***In re: Student with a Disability*, 57 IDELR 59 (SEA New York 2011)**. The student participated in the theft of an electronic device from another student. Aside from a post hoc explanation by a school psychologist and assistant principal that they concluded the behavior was not a manifestation of disability because the student knew right from wrong, there was no evidence of how the team reached its determination. THe documentation did not show the date of the MDR, whether the parent participated, or how the District arrived at its conclusion. The hearing officer ordered a reevaluation of the student and a re-conducting of the MDR.

In ***Renton Sch. Dist.*, 111 LRP 39470 (SEA Washington 2011)**, a hearing officer overturned the school's MDR, finding that it faulty because the team focused only on the student's recognized disabilities despite suspecting that the student also may have had Autism and an intellectual disability. Moreover, the student's behavior had recently changed significantly, as he began to display aggressive behavior. In light of the facts, the team should have suspected the presence of additional disabilities, thus giving rise to a duty to evaluate in those areas. The hearing officer allowed the change in placement to stand only because he found that placing the student back in his pre-discipline placement would create a substantial likelihood of injury to self or others.

A student and a classmate talked and texted each other about sharing prescription sleep medication before taking pills at school, where they were caught. ***San Diego Unified Sch. Dist.*, 109 LRP 54649 (SEA California 2009).** The parents argued that the offense was an impulsive act related to their son's

ADHD. The hearing officer rejected the argument in light of the long-term arrangements of the students over the course of days. On the impulsivity question, also see *In re: Student with a Disability*, 109 LRP 56732 (SEA Virginia 2009)(student who shifted from one disruptive behavior to another over a period of time in class, and after correction, was not acting impulsively).

In the case of ***Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008)**, a high-school student with emotional disability (diagnoses of Tourette's, ADHD, anxiety disorder, and OCD) planned and led an incident where he and some friends shot paintballs at school buildings and buses over a period of several hours. After he admitted to the offense, the school recommended expulsion, which was later changed to a suspension for the remainder of the school year. An MDR team found that the behavior was not related to the student's emotional disability. The parents disagreed and initiated legal action, claiming that the team was improperly constituted, that they had a equal right to make the manifestation determination, and that the school staff had "predetermined" the MDR. The hearing officer rejected all claims, and the court agreed, finding that the parents had the right to invite other team members, but did not do so, and that the team members were appropriate and had relevant information, although some did not know the student well. The court disagreed with the parents' contention that each MDR member is required to read every piece of information in the student's file prior to the MDR meeting. It also disagreed with the allegation of pre-determination, finding that the MDR process was thorough and careful, even though staff had met informally prior to the MDR meeting itself. Finally, the court agreed with the hearing officer that the student's emotional disability neither caused, nor was substantially or directly related to, the paintball shooting incident. The student was not impulsively draws into the incident by friends, as his parents argued, but was rather the predominant planner and leader of the event, going so far as to drive the friends to the school and return three times with more paintball guns and ammunition, all over a period of hours.

The impulsivity argument also did not help another high school student from Massachusetts who was facing additional removal due to an off-campus felony car break-in. ***Medford Public Schs*., 110 LRP 31566 (SEA Massachusetts 2010).** The hearing officer agreed with school staff that the circumstances of the nighttime car break-in involved careful planning and preparation, including arranging for a disguise and attempting to set up an alibi. With respect to the school behaviors, staff indicated that he enjoyed the "drama" of misbehavior and often planned his conduct to achieve maximum exposure and effect. Although a private psychologist wrote to the school arguing that the behaviors were in fact related to executive function deficits, there was no evaluation record of such deficits, the psychologist had not conducted an evaluation, he had limited

contact with the student, and no knowledge of the nature of the underlying behaviors.

After a 14-year-old boy with LD and ADHD was caught selling pot and trading it for food at school, and it was determined he had done it on several other occasions, the school recommended a disciplinary change in placement. ***Okemos Pub. Schs.*, 45 IDELR 115 (SEA Michigan 2006).** The parents claimed that the behavior was impulsive, and thus directly related to his ADHD. They also claimed the distinction between use and distribution of drugs was merely semantic. The hearing officer found that the spans of time involved in arranging for the various drug transactions gave the student "time to reflect on his actions at each step… In short, rather than being 'spur of the moment' or impulsive, the record evidences the student's conduct was more calculated." Moreover, the parents' expert was surprised on the witness stand to find out that the behavior involved not drug use, but sale and distribution. The hearing officer held that the distinction was not merely semantic, "either practically, behaviorally, or legally."

> *Comment*—The hearing officer cites the case of *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37, 35 IDELR 189 (D.Me. 2001) as an example of the proposition that if a behavior involves sufficient time, motor planning, and opportunity for thought, it cannot be considered impulsive and thus related to ADHD. When confronted with MDs on ADHD students' behavior, it is important for MDR/IEP teams to analyze behavior in terms of time involved and degree of planning required. In situations involving students with emotional or behavioral disorders, the claim that the behavior was impulsive and thus related to the disability is common. But, as the cases show, the argument is only effective where the behavior in questions is impulsive on its face. If the behavior involves a significant degree of planning, steps, or time, the argument rarely succeeds. See e.g., *Reeths-Puffer Schs*., 52 IDELR 274 (SEA Michigan 2009)(possession of knife at school not spontaneous unreflective act indicative of impulsivity or another ADHD characteristic).

At times, however, the impulsivity claim is supported by evidence. In the case of ***In re: Student with a Disability*, 52 IDELR 239 (SEA West Virginia 2009)**, a 13-year-old with ADHD, oppositional defiant disorder (ODD), and borderline to low-average IQ apparently took a pill offered to him in the school bathroom after he felt pressured by a bigger boy. There was, moreover, evidence in the school records that the student was impulsive and easily manipulated into misbehavior. The hearing officer found the 20-minute, cursory MDR deficient in that it failed to evaluate all the pertinent information, particularly the reports that the student was easily manipulated into wrongdoing. In fact, the hearing officer found that the school staff had predetermined that there would be a

finding that the behavior was not a manifestation of disability, and thus, the parents did not have a meaningful opportunity to participate.

A California school was derailed in its attempt to discipline a student for his peripheral involvement in the sale of some marihuana seeds. ***San Diego Unified Sch. Dist.*, 52 IDELR 301 (SEA California 2009).** For several days prior to the sale, the student, a 13-year-old with ADHD, acted as a "middleman," but also skipped his ADHD medication. The hearing officer concluded that the fact that the student was not on medication, coupled with evidence confirming the student's impulsivity when not on medication, should have led the school team to find that the behavior was directly related to the ADHD.

> *Comment*—Curiously, however, the behavior appeared to have been well-planned and thought out over a significant period of time, which normally is inconsistent with a finding that the behavior was impulsive. Moreover, from a policy perspective, is it wise to provide a potential incentive for a student to discontinue potentially helpful medication? Other than a student or parent's statement, how can schools or hearing officers determine if a student truly missed a medication dose during a behavioral incident?

A Pennsylvania 11th grader with LDs and ADHD brought to school a hunting knife with a folding 3-inch blade, claiming that he needed it for "protection." Students indicated that he had threatened others while exhibiting the knife, and that he had brought it to school on various occasions and while walking to and from school. ***MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006).** Before the school conducted the MD, the parent obtained an evaluation from an outpatient psychiatric facility that also diagnosed the student with port-traumatic stress disorder (PTSD), oppositional defiant disorder (ODD), and impulse control disorder. Nevertheless, the team determined the behavior was not a manifestation, and placed the student in a 45-day alternative education placement for the weapons violation. After a hearing officer found the behavior was related to disability, the school appealed to an appellate panel. The panel overturned the hearing decision, finding that the fact that the student brought the knife to school deliberately and regularly indicated the behavior was not impulsive or ADHD-related. The recent new diagnoses were not given serious weight, as their supporting evidence was "scant," and report was "cryptic" and brief, and the student's school conduct did not support the diagnoses.

> *Comment*—The panel states that even if the student met the "medical-model" standards for the new diagnoses, "the evidence was lacking that that he met the legal-model criteria for any IDEA impairment, such as other health impairment (OHI), which all include an adverse effect on

educational performance to the extent of requiring special education." In a footnote, the panel indicated that had the IEP team "accepted" these diagnoses, "we would have been faced with a different case." Does a disability have to meet IDEA eligibility criteria, standing alone, to merit consideration for MD purposes? In situations of mixed-condition disabilities, is it feasible practically to tease out each condition for either eligibility or MD purposes?

MDRs and Special Offenses—Under the IDEA, schools can remove students to alternative settings for up to 45 days for offenses involving weapons, drugs/controlled substances, or serious bodily injury, even if the behavior is related to disability. 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g). Therefore, in the *MaST Comm. Charter School* case reviewed above, could not the school have argued that the MD dispute was moot, since whether the behavior was related to disability or not, it had the authority to remove the student up to 45 school days for either drugs, weapons, or serious bodily injury offenses? That was the ruling of a New Jersey federal court in *A.P. v. Pemberton Township Bd. of Educ.*, 45 IDELR 244 (D.N.J. 2006). There, the court found that it was immaterial that the school conducted the MD late, since regardless of the result the school could remove the student up to 45 school days for the student's drug offense, and the untimely MD was partly due to the parent's refusal to attend the meeting earlier.

In a case of bringing razor blades to school, a student ironically fared more poorly in the MDR process because he had simply forgotten they were in his pockets, rather than due to some impulse to bring a weapon to school. ***Inland Lakes Pub. Schs.*, 110 LRP 20187 (SEA Michigan 2009).** After going fishing the day before, a student with ADHD, oppositional defiant disorder, bipolar disorder, and LDs forgot that in his shorts' pockets were two single-sided razor blades he had been using to cut fishing line. When another student saw the blades, he tried to conceal them, but turned them over to adults when asked. The MDR team determined that the act was one of forgetfulness, not impulsivity, and that he was no more forgetful than any other student. The hearing officer agreed, finding that the student's momentary actions showed "an experience-based and rational judgment" that his only chance of avoiding discipline in this zero-tolerance district was to try to conceal the blades when he found them in his pocket.

In an Illinois case, however, a hearing officer overturned a district's decision that a 17-year-old student's Facebook threat to another student was not related to his ADHD, Bipolar Disorder, borderline IQ, and poor executive functioning. ***Township High Sch. Dist. 214*, 54 IDELR 107 (SEA Illinois 2010).**

The school team argued that planning was required for the student to log on to Facebook, enter the text of the threat ("when I come back to school I'm going to look for u and kill you for giving me hell"), and then decide to send the message. The team thus found that the behavior was not related to the student's disabilities and the district proceeded with expulsion. The hearing officer reversed the team, agreeing with the student's treating psychologist that the student's deficits in executive and cognitive functioning meant he really could not have planned the threat. "Student did not engage in a deliberate violation of the school's code of conduct in that he did not fully comprehend the potential consequences of his actions. He did not understand that he could be suspended or expelled, not did he intend to carry out the threat."

> *Comment*—Under the modern IDEA standard for manifestation determination reviews, is it relevant that a student "did not fully comprehend the potential consequences of his actions"? Curiously, the hearing officer neither cites the applicable IDEA standard, nor analyzes how the facts of the case should be applied to the IDEA questions. The reference to the student not fully understanding the potential consequences of the offense was front and center under the 1997 formulation for MDRs, but is now subsumed within the straightforward modern MDR questions, to the extent it remains part of the analysis.

The Georgia case of ***Fulton County Sch. Dist.*, 49 IDELR 30 (SEA Georgia 2007)**, on the other hand, underscores the need to consider the full range of a student's disabilities in making the MD. After a student with ADHD and ODD verbally threatened to kill a teacher, the MD team only considered whether the threat behavior was related to ADHD, and refused to allow the parents to provide information or input on the effect of his ODD, even though the school psychologist noted that all of the child's disabilities had to be considered as part of the MD.

> *Comment*—Aside from the fact that the school acknowledged the student's ODD, there was evidence that the student had engaged in previous verbal threats, which were never carried out. In this case, moreover, the student was eligible under IDEA only as a child with other health impairment (OHI), and not ED. But, unlike in the Pennsylvania case above, this hearing officer did not feel that the school was free to limit the MD only to the ADHD diagnosis simply because the ODD did not rise to the level of IDEA eligibility separately.

In a California case, a young lady with PTSD kicked a male student in the groin, and was recommended for disciplinary removal for the offense. ***Manteca Unified Sch. Dist.*, 50 IDELR 298 (SEA California 2008).** The hearing officer

concluded that the student's treating psychiatrist was more knowledgeable about her PTSD than the school neuropsychologist, who found that the behavior was unrelated to her PTSD without further explanation. The treating psychiatrist's opinion was that the behavior was related to the PTSD because the boy was sexually harassing her, her original trauma was caused by a sexual assault, and persons with PTSD are "hypervigilant" and have difficulty regulating their emotions.

> *Comment*—Curiously, however, the young lady who was being harassed actually warned the harassing boy that she was having a bad day and that he should leave her alone. And, the student who was harassing her was making fun of her for having a cold sore and facial paralysis (as a result of a brain hemorrhage), rather than *sexually* harassing her. Additionally, the parents had refused to consent to have a behavior plan implemented that could have prevented the behavior. *See* footnote 4. It is possible, rather, that the hearing officer was simply unwilling to allow a student to be disciplined for understandably responding to being cruelly picked on about her physical condition. Moreover, the school psychologist had never assessed or treated the student.

A 6th grader with Asperger's who really wanted to go home when he was having a bad day at school pulled on his principal's necktie to escalate the incident. ***Scituate Pub. Schs.*, 47 IDELR 113 (SEA Massachusetts 2007).** The school decided that the use of the tie constituted a weapon, thus triggering the special offense provisions. First, the hearing officer decided that the tie did not constitute a weapon, since an attacker could not readily cause serious bodily injury if he attacked a person with a tie. Second, the student did not "possess" the tie because he held it only momentarily and did not have control of it. Third, although there was some relation between the combination of disabilities and the offense, it did not rise to the level of a direct or substantial relationship. The student's behavior was "calm, deliberate, voluntary, and calculated."

> *Comment*—The school's argument that the pulling of the tie constituted use of a "weapon" was certainly a stretch, and one that did not withstand much legal scrutiny. The hearing officer also notes that there was no evidence that the student "did not understand the seriousness or consequences of his actions…" Is this not, however, another example of a throw-back to the pre-2004 MD analysis, which required a review of whether the student's disability impaired their ability to understand the consequences of the behavior? See, e.g. *Reeths-Puffer Schs.*, 52 IDELR 274 (SEA Michigan 2009)(In ruling on MDR challenge, HO notes that student's responses showed he understood the repercussions of his behavior and was able to understand the potential consequences of his action).

In another Massachusetts case, a 17-year-old with ADHD and ODD became upset and tried to call his mother on his cell phone so she would pick him up and take him home. ***Swansea Pub. Schs.*, 47 IDELR 278 (SEA Massachusetts 2007).** Because he was speaking in a highly agitated manner to his mother, a staffperson asked that he go into an office. He escalated, however, throwing his phone down. When the staffperson picked up the phone, he became irate and physically threatening, blocking the staffperson's ability to leave and lunging at her, to the point that he significantly frightened her. Relying significantly on the parent's expert, who testified that the student was unable to self-regulate once escalated, the hearing officer held that "the student was provided no such opportunity to avoid an escalation of the original confrontation with Ms. Ragland, with the result that a spiraling of confrontational, out-of-control behavior occurred."

> *Comment*—School staff that worked with the student testified, however, that in other confrontation situations, the student had demonstrated an ability to de-escalate and avoid extreme behavior. They added that violence and aggressive behavior are not generally associated with ODD and ADHD. The hearing officer, however, discounted their testimony in favor of the parent's expert, although the expert testified purely from a review of records and had not personally evaluated the child. It certainly appears, from the decision, moreover, that the hearing officer questioned the staffperson's handling of the incident. To what degree does such post-hoc inquiry into the staff's conduct in response to the behavioral offense bear into the legally-required MDR questions?

Reports to Law Enforcement Authorities

IDEA makes clear that schools may report criminal offenses committed by special education students at school, and that IDEA grants such students no immunity for their potentially criminal conduct. 20 U.S.C. §1415(k)(6)(A). In addition, the provision calls for disclosure of educational records, after parental consent, to law enforcement after the report of a potential criminal offense at school. 20 U.S.C. §1415(k)(6)(B); *see* 34 C.F.R. §300.535(b)(2)(disclosure must comply with FERPA). The provision has been the subject of significant debate, in light of concerns over the "school-to-prison pipeline" phenomenon whereby substantial numbers of students with disabilities are first removed from school, get involved with juvenile authorities, and unfortunately in too many cases, proceed to the adult criminal justice system. Thus, the provision should be used in situations of true criminal offenses, and hopefully, after dialogue with local law enforcement authorities. School administrators, moreover, must ensure that resort to law enforcement occurs in a non-discriminatory fashion, for

nondisabled and disabled students alike. In addition, staff must ensure that the student's BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken *instead* of complying with the requirements of a BIP or IEP. Moreover, administrators would be well-advised to engage in dialog with law enforcement authorities about exactly what type of conduct constitutes criminal conduct, and what offenses will normally lead to enforcement and which might not.

Functional Behavioral Assessments and Behavior Intervention Plans

What is a Functional Behavioral Assessment (FBA)?—The FBA requirement is related to the provision in IDEA requiring that "in developing an IEP for 'a child whose behavior impedes the child's learning.' the school district must 'consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.'" 20 U.S.C. §1414(d)(3)(B)(i). There is no language, however, on the necessary components of an FBA, or who must conduct an FBA. See *Letter to Janssen*, 51 IDELR 253 (OSERS 2008). Neither IDEA '04 nor the 2006 final regulations, moreover, contain a definition or additional guidance with respect to FBAs.

> In commentary to the 1999 IDEA regulations, the USDOE indicated that in conducting an FBA, "the IEP team need to be able to address the various situation, environmental, and behavioral circumstances raised in individual cases. 64 Fed. Reg. 12,620 (1999).
>
> The FBA is likely to include information regarding type of behaviors, frequency, severity, location, triggering factors, and previously attempted strategies, among others. There is no requirement that the FBA be conducted with the assistance of a school psychologist, or that it be part of a psychological evaluation.

When is an FBA required?—The general rule is that if an IDEA-eligible child is exhibiting recurring behaviors that impede their learning or the learning of others, a FBA should be conducted to help determine the potential need for a behavior intervention plan (BIP). See *Connor v. New York City Dept. of Educ*., 109 LRP 67,343 (S.D.N.Y. 2009)(Lack of FBA not a denial of FAPE where student's anxiety and fidgeting did not impede his learning in the classroom). In addition, IDEA provisions at sections 1415(k)(1)(D) and (F) also require FBAs in the two following situations:

> **For long-term removals—**In addition, IDEA requires an FBA "and behavioral intervention services and modifications" when the school

undertakes a disciplinary change in placement based on a long-term (>10 consecutive school days) removal, including in situations where the student is removed due to special offenses (drugs, weapons, serious injury). 34 C.F.R. §300.530(d)(1)(ii).

When behavior is determined to be related to disability—Also, the regulation requires an FBA and implementation of a BIP when the school determines that a behavior is a manifestation of the child's disability in a manifestation determination review. If a BIP had already been developed, the regulation requires a review of the BIP, with revisions as necessary to address the behavior. 34 C.F.R. §300.530(f)(1).

What about cumulative removals totaling 10 school days in a school year?—As with the language of IDEA '04, the final regulations do not contain any requirement to conduct the FBA/BIP process when a student has been removed a total of 10 school days in a school year. Schools, however, are cautioned that the general threshold for conducting the FBA/BIP process is when the student engages in recurring behaviors that interfere or impede their learning or that of others. As a matter of good practice, schools should use the FBA/BIP early in situations of repeated or escalating misbehavior, for both educational and legal reasons. In situations where a student has been removed 10 days within a school year, it is highly likely that the standard of recurring-behavior-that-impedes-learning has been met, and thus an FBA is needed.

Is an FBA a required "prerequisite" to developing an appropriate BIP?—The general notion is that the FBA data informs the development of the BIP and is the data foundation of the BIP. But, legally, a BIP could be appropriate even if a formal FBA was not conducted. In the recent case of *C. F. v. New York City Dept. of Educ.*, 57 IDELR 255 (S.D.N.Y. 2011), a federal court held that a BIP was appropriate, and addressed the pertinent behavioral issues, despite not being preceded by an FBA. The court ruled that the IEP team "had access to a substantial amount of information on C.F.'s current interfering behaviors and did draft a BIP, which reflected the behaviors and provided for the continued use of intervention strategies." Nevertheless, it appears advisable for districts to proceed along the lines of the generally accepted practice of conducting FBAs to collect the data necessary to formulate appropriate BIPs.

What about children who come from private schools?—In situations where a child has been placed in private schools before enrolling in a public school, the public school IEP can rely on behavioral observations and data provided by the private school. See *A. L. v. New York City Dept. of Educ.*, 57 IDELR 69 (S.D.N.Y. 2011).

Is an FBA an "evaluation" requiring parental consent under IDEA?—In 2007, OSEP explained that a district that intends to conduct a functional behavioral assessment should ask whether the planned FBA will focus on the educational and behavioral needs of a specific child. If so, the FBA qualifies as an evaluation or reevaluation under Part B and therefore triggers all of the accompanying procedural safeguards, including the need to seek parental consent. If, however, the district uses an FBA as a widespread intervention tool to improve the behavior of all students in its schools, the FBA is not an evaluation and parental consent is not necessary. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007); see also *Northwestern School Corp*., 111 LRP 26,429 (SEA Indiana 2011)(district that used questionnaires to gather information from a kindergartner's teachers as part of an FBA should have obtained parental consent first, as this was not merely a review of existing data, but rather a collecting of new data).

> ***What about prior written notice (PWN)?***—OSEP has also indicated that prior written notice must be provided before the school conducts an FBA, as would be required prior to any other evaluation determined necessary by the IEP team. *Letter to Anonymous*, 59 IDELR 14 (OSEP 2012).

Can a parent request an independent FBA if the district has conducted its own FBA and the parent disagrees with it?—Apparently yes. OSERS has ruled that a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP is entitled to request an IEE at public expense. *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

Is there a requirement for a FBA/BIP in cases where there is no manifestation or "link"?—Although some sought for USDOE to require the FBA/BIP process even in situations where the behavior was not related to disability, USDOE declined. It stated that "we must recognize that Congress specifically removed from the Act a requirement to conduct a functional behavioral assessment or review and modify an existing behavioral intervention plan for all children within 10 days of a disciplinary removal, regardless of whether the behavior was a manifestation or not. We also recognize, though, that as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, the Act emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, "the use of positive behavioral interventions, and other strategies to address the behavior." (See section 1414(d)(3)(B)(i) of the Act). This provision should ensure that children who need behavior intervention plans to succeed in school receive them." Fed. Reg. 46,721. Here, USDOE is reminding

schools that the FBA/BIP process is one that must be considered proactively, in response to behavior that impedes learning, irrespective of a recommendation for serious disciplinary action.

No specific requirement for FBA/BIP after 10 removal days—As with the new statute, the final regulations do not contain any requirement to conduct the FBA/BIP process when a student has been removed a total of 10 school days in a school year. Schools, however, are cautioned that the general threshold for conducting the FBA/BIP process is when the student engages in recurring behaviors that interfere or impede their learning or that of others. As a matter of good practice, schools should use the FBA/BIP early in situations of repeated or escalating misbehavior, for both educational and legal reasons.

Comments on Behavior Intervention or Support Plans (BIPs)

When to develop a behavior intervention plan?—Generally, an IEP team should consider development of a BIP whenever an IDEA student exhibits recurring behavior problems that impede their learning or the learning of others. Indeed, the applicable regulation states that "the IEP Team must . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. §300.324(a)(2)(i); 20 U.S.C. §1414(d)(3)(B)(i). From a practical standpoint, experience tells educators that it is best to intervene early with a plan of supports and interventions, before the behavior pattern becomes entrenched and more difficult to address.

> *Lack of legal definition*—Beyond requiring that IEP teams address this "special factor," the IDEA and its regulations are silent as to legal requirements or proper components for BIPs. The law leaves up to individual IEP teams and local best practices the guidelines for formulating plans of behavioral supports and interventions, which are known by different terminology (e.g., BIP—Behavior Intervention Plans, BSP—Behavior Support Plans),
>
> *A point on BIP forms*—The forms that are used to develop BIPs should be flexible, and allow for the most individualized process possible. Although not necessarily inappropriate, checklist BIPs tend to "shoehorn" staff into the listed strategies, instead of encouraging innovative and uniquely individualized approaches. Moreover, many checklist items on BIP checklists include interventions and strategies that really are nothing more than traditional classroom discipline management techniques, rather than innovative ideas for individualized interventions for particular problem behaviors.

Interplay with IEP goals and objectives—The BIP should tie into the behavioral goals and objectives on students' IEPs. The BIP provides day-to-day strategies and techniques to address the behavior, while the objectives serve to measure progress on the behaviors in question.

Common BIP Problems

1. Not taking nature of disability into account
2. Insufficient customization of consequences and reinforcers (reduces their effectiveness)
3. Inappropriate or partial implementation by instructional staff
4. Simple lists of consequences—punishment-only formats
5. Lack of meaningful positive strategies to prevent behaviors or promote acquisition of appropriate replacement behaviors
6. Failure to revise ineffective BIPs (watch for old BIPs that student now manipulates or learns to "work")
7. Using minor modifications to regular discipline plan for complex cases (difficult cases require well thought-out and highly individualized BIPs)
8. Contingencies not clear or specific (leads to staff confusion and inconsistent implementation)
9. Insufficient contingencies (give staff a plan B if A fails)
10. Failure to address all target behaviors
11. Overreliance on checklist-based form

Some BIP-related Cases

***Little Rock Sch. Dist.*, 37 IDELR 30 (SEA Arkansas 2002)**—Failure to provide appropriate BIP for student with disruptive and injurious behaviors led to need for more restrictive environment. BIP was outdated, used a one-page form, and relied mostly on the parents taking the student home when he misbehaved.

***Conroe Ind. Sch. Dist.*, 38 IDELR 53 (SEA Texas 2002)—**The hearing officer found that the BIP for a student with extremely disruptive behavior and verbal outbursts was appropriate. It contained some planned ignoring of minor behaviors, warnings, cooling-off periods, and limited personal reactions to disciplinary incidents.

***Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003)—**The need for a proper BIP existed long before the school made efforts to establish a plan for a student with stress-related behavior problems. For a significant time, the student exhibited behaviors that impeded his ability to benefit from his education, and there was no BIP.

***In re: Student with a Disability*, 41 IDELR 115 (SEA Wisconsin 2003)—**Hearing officer disagreed with parents that BIP was inappropriate because it called for consequences that included suspension. The BIP contained positive behavioral supports and strategies, and the use of consequences was not inappropriate, even for behavior related to disability. Moreover, the district had the right to make the final disciplinary decisions, even if the BIP called for consulting the parents.

***Mobile County Bd. of Educ.*, 40 IDELR 226 (SEA Alabama 2004)—**District failed to conduct an FBA and implement a BIP for an 11-year-old student with severe MR, CP, hearing loss, ADHD, and ED who exhibited aggressive behaviors, which led to the student's arrest.

***Alex R. v. Forrestville Valley Community Unit Sch. Dist #221*, 41 IDELR 146 (7th Cir. 2004)—**BIP drafted to deal with student's escalating behaviors was appropriate, and included visual aids, sensory breaks, and manipulatives. The court noted that the IDEA did not include specific substantive requirements for BIPs. Even though the student became more violent, and eventually needed a more restrictive behavior unit, the court refused to find that the BIP was not appropriate.

DIVIDER

Evaluation, Assessment, and IEPs

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I.

INTRODUCTION TO IDEA EVALUATION REQUIREMENTS

IDEA Terminology

- Evaluation
  - Procedures used to determine a child's initial and continuing eligibility for IDEA services
- Assessment
  - The ongoing procedures used to identify a child's unique strengths and needs

IDEA Contexts Where Evaluation is Important

- Screening and/or Referral
- Eligibility
- Program planning
- Progress assessment

IDEA Evaluation Requirements

- Initial evaluation
- Independent Education Evaluation (IEE)
- 3-Year Re-evaluation

Procedural Requirements

- Written parent consent
- A hearing to override lack of parent consent
- Notice that includes a description of each evaluation procedure
- 60 days (Federal and Missouri standard)
- Determine eligibility AND the child's educational needs

Conducting an Evaluation

- LEA must use a variety of tools and strategies
- No single measure/test is adequate
- Functional, academic, and developmental information, including information from parents
- Evaluation must identify all of a child's special education needs

Evaluation and Assessment Materials

- Must not be racially or culturally biased
- Must be provided in native language/other mode of communication
- Must be used for the purpose for which they were designed
- Must be administered by trained personnel
- Must be administered according to directions
- Must assess more than IQ
- Must not reflect sensory impairements

Additional SLD Requirements

- Classroom observation of academic performance
- Evaluation team must include parents, general educator, and a person qualified to conduct diagnostic evaluations
- Written report of evaluation results
  - Each member must indicate agreement (or disagreement) with eligibility decision

Response to Intervention

- Only referred to in the context of SLD eligibility
- RTI is allowed when properly documented
- Use of RTI may not delay an initial special education evaluation

Common RTI Model

Eligibility Determination

- Assessment team and parents make decision
- Child must have a disability that fits in one of the 13 IDEA disability categories
- Child must need special education
- Disability must have an *adverse* effect on child's educational performance
- Eligibility many not be based on child's limited English proficiency or lack of reading/math instruction
- Parents must be given copy of evaluation report at no cost

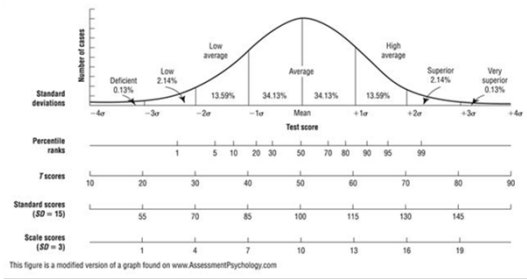
II.

FOUNDATIONAL INFORMATION ABOUT ASSESSMENT

Important Terms

- Validity
- Reliability
- Normal Curve
- Standard Scores and Percentiles

Normal Curve



This figure is a modified version of a graph found on www.AssessmentPsychology.com

Norm-Referenced (NR) Tests

- NR tests compare student performance to the performance of similar students in the norm group
- Two types of scores
  - Developmental (age and grade equivalents)
  - Relative standing (percentiles, standard scores, deviation Iqs)
- Scores of relative standing are preferred

Criterion-Referenced (CR) Tests

- CR tests compare student performance to a preset standard for acceptable performance.
- Types of Scores
  - Single-item scores
    - Dichotomous scores
    - Continuum scores
  - Multiple-items scores
    - Percent correct
    - Accuracy
    - Labels for accuracy

Curriculum-Based Assessment (CBA)

- Direct measurement of student skills
- Test consists of single skill or multiple skill probes (see Appendix D)
- Common, standardized, time procedures for administration
- Standardized set of scoring procedures

Other Types of Test Scores

- Global ratings
- Authentic assessments: Portfolios
- Both are subjective and not particularly useful

Preferred Test Scores

- Percentiles
- Standard scores (SS, z-score, T-score)
- Scores from CR tests that have been normed

Truths About Testing

- Test scores always contain error.
- "True" scores can only be estimated, never obtained.
- Error can occur in test selection, administration, scoring, recording, or interpreting results.
- IDEA does not allow reliance on mathematical formulas in determining eligibility.
- Test norms need to match the student's acculturation and response capabilities.
- Tests give us a "snapshot" of current performance.

III. Issues in Individual Program planning

- Does the evaluation provide an adequate and appropriate foundation for program planning?
- Does the evaluation allow the IEP team to determine the range and intensity of needed services?
- Is the LEA willing and able to insure that all appropriate services are available?

IV.

ISSUES IN PROGRESS ASSESSMENT

Common IEP Issues

- PLAAPF statements fail to provide a measurable, objective beginning point.
- Annual goals are not measurable.
- Progress reports are subjective and nearly meaningless.

Issues with Progress Reports

- Progress is based on student's grades or the fact that student has advanced from grade to grade.
  - Most grading is largely subjective.
  - Students in special education are often graded on a different standard.
  - Grades for students who change schools may be based on a different standard for each school.
  - No recognized standards for determining if a student will be promoted to the next grade.

Issue with Using Standardized Scores for Progress Reports

- Standardized tests should not be given frequently; therefore, they are not appropriate for progress reports during the year.
- Few standardized tests are sensitive to small changes in performance.
- A growing number of school personnel are using CBA for measuring student progress. This is GOOD.

V.

GOOD AND BAD EXAMPLES OF PLAAFP STATEMENTS AND ANNUAL GOALS

Examples of PLAAFPs and Annual Goals that *Do Not* Allow Meaningful Progress Assessment

- PLAAFP: S is an outgoing 4-year old who has motor delays.
- Goal: S will improve her motor functioning by 50%.

- PLAAFP: S is unable to communicate his wants and needs easily.
- Goal: S will learn the names of 10 objects and be able to say them.

- PLAAFP: S does not acknowledge the presence of peer communicative partners in an observable manner.
- Goal: S will acknowledge peers in an observable manner 90% of the time.

Examples of PLAAFPs and Goals that *Do* Allow Meaningful Progress Assessment

- PLAAFP: S speaks 4 words that are intelligible to those who know him.
- Goal: S will speak 50 words that are intelligible to those who know him, 35 of which are intelligible to strangers.

- PLAAFP: S reads 2nd grade material orally at 32 cwpm
- Goal: S will read 3rd grade material orally at 60 cwpm

- PLAAFP: S tantrums in the classroom (requiring removal) an average of 3 times daily.
- Goal: S will not require removal from the classroom due to a tantrum behavior during the last month of school.

VI.

SUMMARY OF KEY POINTS

Interpreting Test Scores

- Avoid age and grade equivalent scores as measures of progress.
- Pay attention to scores of relative standing:
  - Percentiles
  - Standard Scores
- Always remember that every test score contains some amount of error.
- Do not rely on mathematical formulas or cut-off scores in eligibility decisions.

General Assessment Rules

- Assessments must measure all areas of need.
- IEEs obtained by parents must be considered by the LEA.
- IEEs must be paid for by the LEA unless the LEA goes to a hearing to show that its evaluation was appropriate.

Evaluation, Assessment & IEPs

Hearing Officer Training – Jefferson City, Missouri
March 26, 2013

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I. Introduction to IDEA Evaluation Requirements

A. IDEA terminology
   1. Evaluation: procedures used to determine a child's initial and continuing eligibility for IDEA services
   2. Assessment: the ongoing procedures used to identify a child's unique strengths and needs

B. IDEA contexts in which evaluation and assessment are important
   1. Screening and/or referral
   2. Eligibility (classification)
   3. Program planning (IEP development: performance levels, services, goals)
   4. Progress assessment (can be a major factor in FAPE, as well as in IEP revisions)

C. IDEA evaluation requirements
   1. Initial evaluation
      a. Full and individual evaluation
      b. Either parents or school personnel may request an initial evaluation
   2. Independent Education Evaluation
      a. Parents are entitled to an IEE at public expense if they disagree with the LEA's evaluation. However …
      b. If the LEA establishes at a due process hearing that its evaluation was appropriate, then it need not pay for the IEE.
      c. The IEE must meet certain requirements and, if it does, the IEE must be "considered" by the LEA.
   3. Three-year re-evaluations
      a. Students who receive IDEA services must be re-evaluated at least every 3 years.
      b. The re-evaluation is necessary to determine the student's ongoing eligibility.

   c. Parent consent is required.
4. Procedural requirements
   a. LEA must obtain written parent consent.
   b. A hearing is required to override lack of parent consent.
   c. LEA must provide parents with notice that includes a description of each evaluation procedure to be used.
   d. Evaluation must be conducted within 60 days (Federal and Missouri standard) timeline.
   e. An evaluation must not only determine whether a child is eligible for IDEA services but must also determine the child's educational needs.
5. Conducting an evaluation
   a. LEA must use a variety of technically sound assessment tools and strategies.
   b. No single measure/test is adequate.
   c. LEA must gather relevant functional, academic, and developmental information, including information from the child's parents.
   d. The evaluation must identify all of a child's special education needs, even if some needs are not commonly linked to the suspected disability.
6. Evaluation and assessment materials
   a. Must not be racially or culturally biased
   b. Must be provided in native language or other mode of communication and in the form most likely to yield accurate information
   c. Must be used for the purposes for which they are valid and reliable
   d. Must be administered by trained and knowledgeable personnel
   e. Must be administered according to publishers' instructions
   f. Must assess more than just IQ
   g. Must not reflect sensory impairments unless that is what is being measured
7. Additional SLD requirements
   a. Someone must conduct a classroom observation of the child to observe the child's academic performance.
   b. The evaluation team must include the child's parents, a general education teacher, and at least once person qualified to conduct diagnostic evaluations.

c. The team must generate a written report of the evaluation results, and each member must indicate his/her agreement (or lack of) with the eligibility decision.

8. Response to Intervention (RTI) in evaluation for SLD eligibility (see Appendix A)
   a. IDEA refers to RTI only once, that in the context of SLD eligibility
   b. RTI is allowed when properly documented
   c. Participation in RTI may *not* be allowed to delay a special education evaluation.

D. Eligibility determination
   1. The assessment team along with the child's parents makes the eligibility decision.
   2. The child's must have a disability that fits one of the 13 IDEA disability categories (see Appendix B).
   3. Because of the disability, the child must need specially designed instruction (i.e., special education) AND the disability must have an *adverse* affect on the child's educational performance.
   4. Eligibility may not be based on a child's limited English proficiency or a lack of appropriate instruction in reading or math.
   5. Parents must be given a copy of the evaluation report at no cost.

II. Foundational Information About Assessment

A. Common and important assessment terms
   1. Validity - extent to which test measures what it purports to measure
   2. Reliability - consistency, accuracy of measurement
   3. Normal (or bell) curve (see Appendix C)
   4. Standard score interpretation
      a) SS: mean = 100, standard deviation = 15 (or some other score)
      b) T-score: mean = 50, standard deviation = 10
      c) z-score: mean = 0, standard deviation = 1
   5. Percentiles
      a. Tells us what percent of a group scored at or below that score
      b. E.g., A student who scored at the 57th percentile scored as well as or better than 57% of the other students who took the test.

B. Norm-referenced (NR) tests and types of scores
    1. Developmental (define an individual's performance in terms of the average of a particular group's performance)
        a. Age or grade equivalents
        b. Avoid these types of scores since people generally misinterpret what they mean.
    2. Relative standing (scores define an individual's performance in terms of the performances of other similar individuals)
        a. Percentiles, standard scores
        b. Have several advantages
            1) They mean the same thing regardless of student's age or the content.
            2) They allow us to compare one person's performance on several tests.
            3) They allow us to compare several people on the same test.

C. Criterion-Referenced (CR) tests and types of scores
    1. Single-item scores
        a. Dichotomous scores (pass/fail, right/wrong)
        b. Continuum scores (number of correct letters/digits; amount of assistance needed to perform; quality of performance, e.g., novice, expert)
    2. Multiple item scores
        a. Percent correct (correct ÷ possible)
        b. Accuracy (correct ÷ attempted)
        c. Labels for Accuracy
            1) Frustration level <85%
            2) Instructional = 85-95%
            3) Independent = > 95%

D. Curriculum-based assessment (CBA)
    1. Direct measurement of student skills
    2. Test consists of single or multiple skill probes (see Appendix D)
    3. Common standardized, timed procedures for administration
    4. Standardized set of objective scoring procedures

E. Other "scores"
   1. Global Ratings - rating on a continuum or on a dichotomous scale. Usually unsatisfactory because:
      a. not based on systematic analysis or quantification of performance, but on "impressions"
      b. Little consistency between/among raters
   2. "Authentic assessment": Portfolios
      a. Subjective, not objective unless a specific grading rubric is used

F. Preferred test scores
   1. Percentiles
   2. Standard Scores
   3. CR tests with norms that allow comparison with others

G. Truths about assessment and test scores
   1. Test scores always contain error. "True" scores can be estimated only, never known.
   2. Error can occur in test selection, administration, scoring, recording, interpreting
   3. IDEA does not allow reliance on cut-off points or mathematical formulas over professional judgment.
   4. To use norms meaningfully we must be able to assume the normative group shares acculturation, experiential background, response capabilities and more with the subject being tested.
   5. Tests inform us about present behavior; we can only infer future behavior.

III. Issues in Program Planning (PP)

A. Does the evaluation provide an adequate and appropriate *foundation* for PP?

B. Does the evaluation allow the team to determine the range and intensity of needed services?

C. Is the LEA willing and able to insure that all appropriate services are available?

IV. Issues in Progress Assessment

A. Common IEP issues

1. Many IEPs fail to provide a measurable, objective beginning point (present levels of academic achievement and functional performance - PLAAFP) from which to assess a child's progress
2. Most IEP annual goals are not measurable, so it is impossible to determine whether each has been reached.
3. Most IEP "progress reports" are subjective and nearly meaningless

B. Issues with progress reports
   1. Sometimes progress is claimed based on student's grades and/or passing from grade to grade. Cautions to remember:
      a. Grading usually has a large subjective component.
      b. Students in special education frequently are graded on a different standard that may be totally subjective (e.g., based on the child's perceived ability, effort; based on a teacher's desire to bolster a child's self-esteem).
      c. In the case of a student who has changed schools, remember that different policies may apply in different schools (e.g., no Fs may be given; X% of the grades will be As).
      d. There are no recognized standards for passing into the next grade. A child's chronological age is usually a major factor, not his/her achievement.

C. Issues with using standardized test scores for progress reports
   1. Standardized tests should not be given more than once or twice a year, and therefore, are not suitable as regular progress report measures.
   2. Few standardized instruments are sensitive to small changes in performance
   3. A growing number of school personnel are learning to use a curriculum-based model of assessment for measuring progress.

V. Good and Bad Examples of PLAAFPs and Goals

A. Examples that *do not* allow meaningful progress assessment
   1. PLAAFP: S is an outgoing 4-year old who has motor delays.
      Goal: S will improve her motor functioning by 50%.
   2. PLAAFP: S is unable to communicate his wants and needs easily.
      Goal: S will learn the names of 10 objects and be able to use them request an item.

3. PLAAFP: S does not acknowledge the presence of peer communicative partners in an observable manner.
   Goal: S will acknowledge peers in an observable manner 90% of the time.

B. Examples that *do* allow meaningful progress assessment
   1. PLAAFP: S speaks 4 words that are intelligible to those who know him.
      Goal: S will speak 50 words that are intelligible to those who know him, 35 of which are intelligible to strangers.
   2. PLAAFP: S reads 2nd grade material orally at 32 cwpm
      Goal: S will read 3rd grade material orally at 60 cwpm
   3. PLAAFP: S tantrums in the classroom (requiring removal) 3-4 times daily.
      Goal: S will not require removal from the classroom due to a tantrum behavior during the last month of school.
   4. PLAAFP: S submits fewer than 10% of her homework assignments each week.
      Goal: Between April 15 and the end of the school year, S will submit at least 90% of her homework assignments every week.
   5. PLAAFP: S engages in an average of 3 fights per week during unstructured times.
      Goal: S will not engage in any fights during the last two months of school.
   6. PLAAFP: S averages less than 30% correct on his Algebra I quizzes.
      Goal: S will average 85% correct on his Algebra I quizzes.

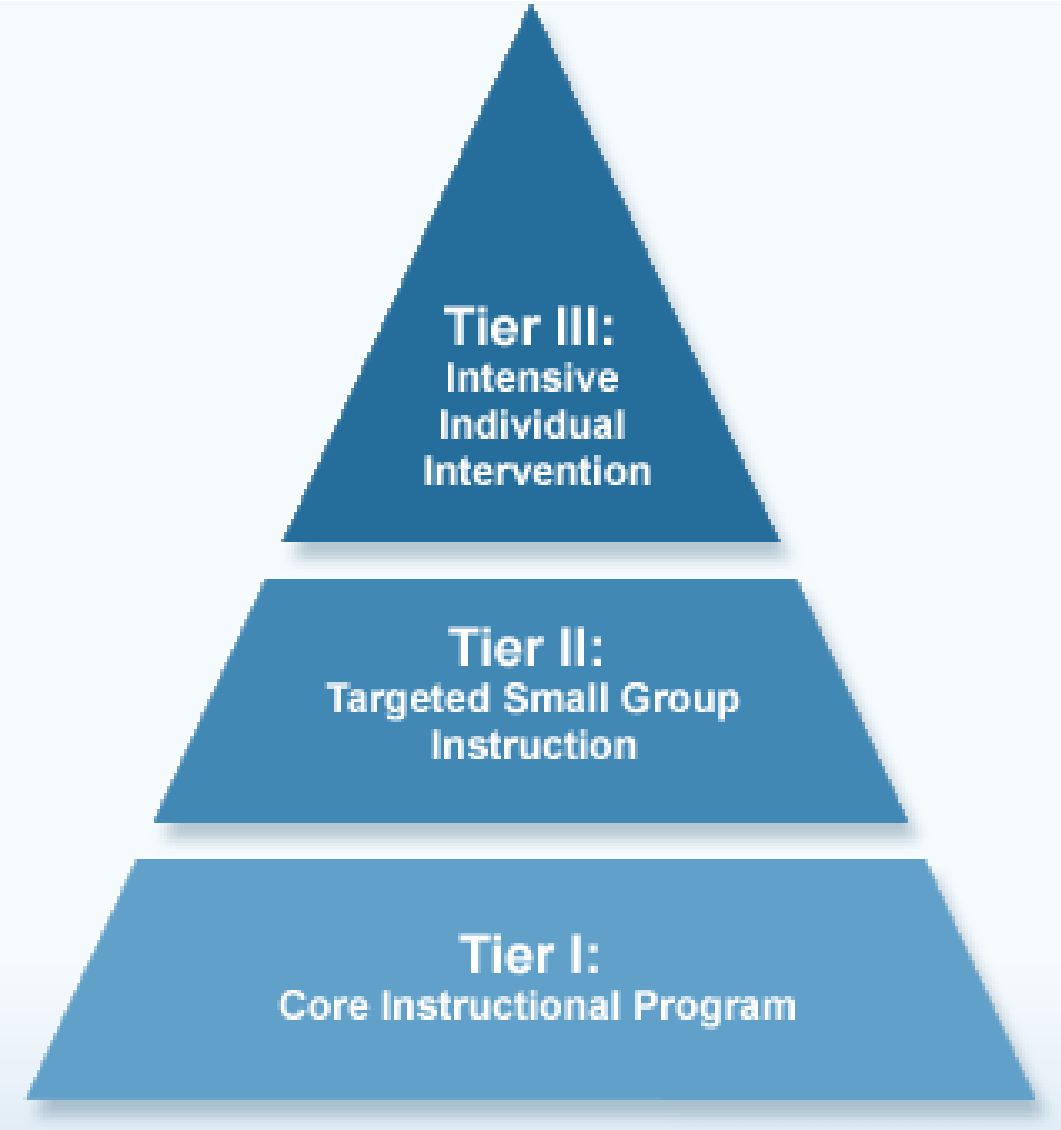
VI. Summary and Key Points

A. Interpreting test scores
   1. Avoid age and grade equivalents as measures of progress.
   2. Pay attention to scores of relative standing.
      a. Percentiles
         1) Remember that a decrease may mean progress. It depends on what is being measured.
         2) Percentiles are easily understood and highly recommended.
      b. Standard Scores (SS, z, T)
         1) Standard scores have all of the advantages of percentiles AND they are the only scores that can be added, subtracted, or averaged.

3. Always remember that every test score contains *some amount of error*.
4. Do not rely on mathematical formulas or "cut-off" scores in eligibility decisions. Federal law rightfully requires that professional judgment must override mathematical formulations, for the above reason (error present in all scores).

B. General Assessment Rules
   1. Remember that assessments must measure all areas related to the disability
   2. Needs must be determined in all areas, regardless of whether they are areas commonly associated with the disability.
   3. Take into account the effect of the disability on the assessments.
   4. Independent educational evaluations (IEEs) obtained by the parents must:
      a. be considered by the LEA
      b. be paid for by the LEA, with no undue delay, unless the district establishes at a hearing that its evaluation was appropriate, i.e., met all IDEA requirements.

Appendix A: Response to Intervention Model



Appendix B: IDEA Disability Categories

34 C. F. R. § 300.8(c)(2006). Definitions of disability terms. The terms…are defined as follows:

(1) (i) ***Autism*** means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(2) ***Deaf-blindness*** means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) ***Deafness*** means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) (i) ***Emotional disturbance*** means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors,

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers,

(C) Inappropriate types of behavior or feelings under normal circumstances,

(D) A general pervasive mood of unhappiness or depression,

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to

children who are socially maladjusted, unless it is determined that they have an emotional disturbance under [subsection (i) above].

(5) ***Hearing impairment*** means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) ***Intellectual disability*** means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) ***Multiple disabilities*** means concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

(8) ***Orthopedic impairment*** means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis) and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) ***Other health impairment*** means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

(10) ***Specific learning disability***-- (i) *General.* Specific learning disability means a disorder in one or more of the basic psychological processes involved in

understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

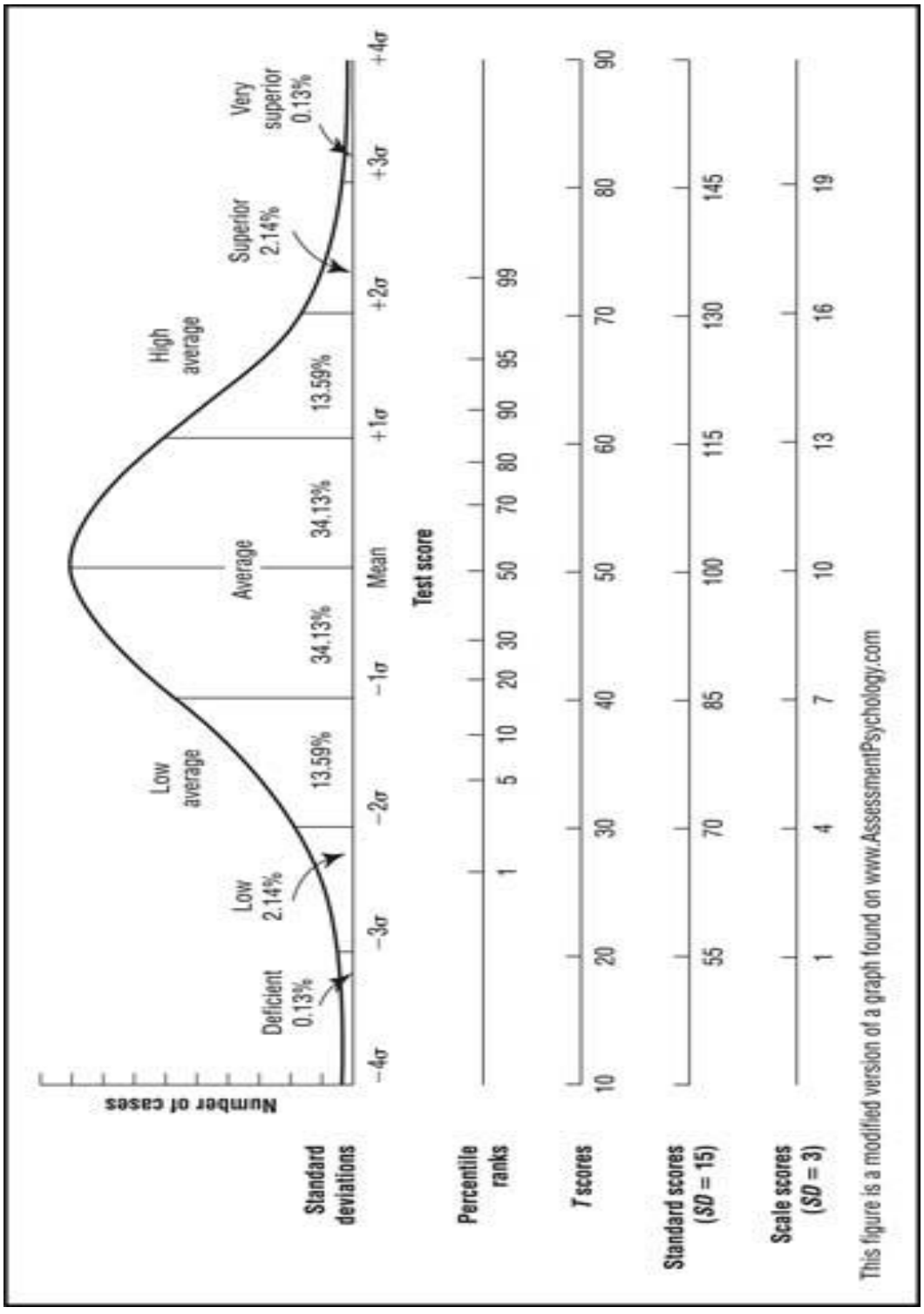
(ii) *Disorders not included*. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation [intellectual disability], of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) ***Speech or language impairment*** means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) ***Traumatic brain injury*** means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgement; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) ***Visual impairment including blindness*** means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

Appendix C: Normal Curve



Appendix D: Oral Reading Fluency Probe

An old man lived in a shack deep in the forest. His tiny shack 14
stood beside a musical brook. He didn't mind that his house was tiny 27
or that the wind blew in under his doors. Even though he was cramped41
and often cold, he could listen to the music of the brook all day and night. 57

In his spare time, the old man made bells out of brass and silver. 71
However, the bells he made were silent. Only the musical brook beside83
his shack could make the bells ring. Every evening the man would carry96
the bells he'd forged that day to the brook and dip them into its musical111
waters. 112

Correct/Error = _____ cwpm

Appendix E: Tests Commonly Used in Special Education

Some commonly used tests that have adequate technical characteristics, i.e., validity, reliability and norms for decision making about an individual student.*

I. Individual Intelligence Tests:

Wechsler Scales:
- WISC-IV (ages 6-16)
- WPPSI (ages 3-7),
- WAIS-IV(>16 yrs old), WASI (ages 6-89).

Woodcock-Johnson (WJ-III) Tests of Cognitive Abilities

II. Nonverbal Tests of Intelligence:

Comprehensive Test of Nonverbal Intelligence, 2nd Edition (CTON-2)
Leiter International Performance Scale - Revised (Leiter-R):
Test of Nonverbal Intelligence - 3 (TONI-3)
Peabody Picture Vocabulary Test - III (PPVT-III):

III. Individual Tests of Achievement

Kaufman Test of Educational Achievement (K-TEA)
Peabody Individual Achievement Test - Revised (PIAT-R)
Wide Range Achievement Test 3 (WRAT3) (called the 'rat')
Wechsler Individual Achievement Test - Second Edition (WIAT-2)
Woodcock-Johnson (WJ-III) Tests of Achievement

IV. Reading Tests - - Individual, Diagnostic

Comprehensive Test of Phonological Processing (CTOPP)
Gray Oral Reading Test, Fourth Edition (GORT-4)
Standardized Test for the Assessment of Reading (S.T.A.R.)
Woodcock Diagnostic Reading Battery (WDRB)
Woodcock Reading Mastery Tests (WRMT-R)

V. Specific tests of Social-Emotional Behavior

Behavior Assessment System for Children (BASC-2) for ages 4-18
Child Behavior Checklist (CBCL/4-18)
Systematic Screening for Behavior Disorders (SSBD)
Walker-McConnell Scale of Social Competence and School Adjustment (W-M)

VI. Specific Tests of Adaptive Behavior

Vineland Adaptive Behavior Scales (VABS)
Adaptive Behavior Inventory (ABI) ages 6-18

VII. Other valid & reliable tests frequently used in special education

Comprehensive Assessment of Spoken Language (CASL)
Developmental Test of Visual - Motor Integration (VMI)
Developmental Test of Visual Perception (revised) DTVP-2)
Goldman-Fristoe Test of Articulation - Second Edition (GFTA-2)
Key-Math Diagnostic Test-III
Stanford Diagnostic Mathematics' Test 4 (SDMT4)
Test of Adolescent Language - 3 (TOAL-3)
Test of Language Development Intermediate, Third Edition (TOLD-I:3)
Test of Language Development Primary, Third Edition (TOLD-P:3)

*

* Tests are continually revised and updated, with new editions being released. No list, including this one can be guaranteed totally current.

DIVIDER

IDEA: Current Litigation and Other Developments

Mark C. Weber
DePaul Univ. College of Law
March, 2013

Introduction

- Services Issues
- Hearings Process and Remedies Issues

Services Issues

- Child Find
- Evaluation
- RTI
- IEE
- Eligibility
- IEPs & Parental Consent Issues
- Appropriate Education & Residential Placement
- Autism Services
- NCLB
- Personnel Qualifications
- Peer Harassment
- Related Services & Assistive Technology
- LRE
- Behavior & Discipline

Child Find

- *D.K. v. Abington Sch. Dist.*
- *Ridley Sch. Dist. v. M.R.*
- *M.J.C. v. Special Sch. Dist. No. 1*

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Evaluation

- *R.P. v. Alamo Heights Indep. Sch. Dist.*
- *G.J. v. Muscogee Cnty. Sch. Dist.*
- *E.M. v. Pajaro Valley Unified Sch. Dist.*

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RTI

- *Michael P. v. Department of Educ.*
- *State Directors of Special Education & Zirkel*

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Independent Evaluation

- *Phillip C. v. Jefferson Cnty. Bd. of Educ.*
- *M.Z. v. Bethlehem Area Sch. Dist.*
- *J.P. v. Anchorage Sch. Dist.*

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Eligibility

- *Fort Osage R-1 Sch. Dist. v. Sims*
- *Hansen v. Republic R-III Sch. Dist.*

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IEPs (I)

- *R.P. v. Alamo Heights Indep. Sch. Dist.*
- *R.E. v. New York City Dep't of Educ.*
- *Anchorage Sch. Dist. v. M.P.*
- *M.H. v. New York City Dep't of Educ.*
- *Ridley Sch. Dist. v. M.R.*
- *T.B. v. St. Joseph Sch. Dist.*
- *Park Hill Sch. Dist. v. Dass*
- *Sumter County Sch. Dist. 17 v. Heffernan*

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IEPs (II)

- *Coventry Pub. Schs. v. Rachel J.*
- *West Virginia Schs. for the Deaf & Blind v. A.V.*
- *C.F. v. New York City Dep't of Educ.*
- *Wilson v. District of Columbia*

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Parental Consent

- *G.J. v. Muscogee Cnty. Sch. Dist.*
- *M.J.C. v. Special Sch. Dist. No. 1*

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Appropriate Education

- *Klein Indep. Sch. Dist. v. Hovem*
- *D.B. v. Esposito*
- *K.E. v. Independent Sch. Dist. No. 15*
- *C.B. v. Special Sch. Dist. No. 1*
- *Independent Sch. Dist. No. 12, Centennial v. Minnesota Dep't of Educ.*

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Residential Placement

- *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E.*

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Autism Services

- *R.E. v. New York City Dep't of Educ.*
- *M.H. v. New York City Dep't of Educ.*
- *Fort Osage R-1 Sch. Dist. v. Sims*

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NCLB, Personnel Qualifications

- *M.M. v. Lafayette Sch. Dist.*

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Peer Harassment and Bullying

- *T.K. v. New York City Dep't of Educ.*

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Related Services and AT

- *R.P. v. Alamo Heights Indep. Sch. Dist.*
- *Petit v. U.S. Dep't of Educ.*
- *Petit v. U.S. Dep't of Educ.*
- *K.M. v. Tustin Unified Sch. Dist.*

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LRE, Behavior, Discipline

- *M.M. v. District 0001 Lancaster Cnty. Sch.*
- *Barron v. South Dakota Bd. of Regents*
- *Bryant v. New York State Educ. Dep't*
- *Park Hill Sch. Dist. v. Dass*
- *B.H. v. West Clermont Bd. of Educ.*
- *M.N. v. Rolla Pub. Sch. Dist. 31*

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Hearings Process and Remedies Issues

- Settlement
- Hearing Requests, Limitations & Related
- Scope of Hearing
- Conduct of Hearing & Impartiality
- Judicial Jurisdiction
- Preclusion
- Mootness
- Prospective Relief
- Reimbursement
- Compensatory Education

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Settlement

- *J.K. v. Council Rock Sch. Dist.*

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Hearing Requests and Limitations Issues

- *M.H. v. New York City Dep't of Educ.*
- *D.K. v. Abington Sch. Dist.*

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Scope of Hearing

- *Goetz & Reilly*

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Conduct of Hearing

- *R.E. v. New York City Dep't of Educ.*
- *Sebastian M. v. King Philip Reg'l Sch. Dist.*
- *Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction*
- *K.R. v. Missouri Dep't of Elementary and Secondary Educ.*

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Impartiality, Finality

- *M.N. v. Rolla Pub. Sch. Dist. 31*
- *R.K. v. New York City Dep't of Educ.*
- *Weiner*
- *Knight v. Washington Sch. Dist.*

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Preclusion, Mootness

- *T.G. v. Baldwin Park Unified Sch. Dist.*
- *E.D. v. Newburyport Pub. Schs.*
- *D.F. v. Collingswood Borough Bd. of Educ.*
- *Gary G. v. El Paso Indep. Sch. Dist.*
- *M.N. v. Rolla Pub. Sch. Dist. 31*

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Prospective Relief

- *B.A. v. Missouri*

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Tuition Reimbursement (I)

- *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E.*
- *T.B. v. St. Joseph Sch. Dist.*
- *Forest Grove Sch. Dist. v. T.A.*
- *Sumter County Sch. Dist. 17 v. Heffernan*
- *C.B. v. Special Sch. Dist. No. 1*
- *C.B. v. Garden Grove Unified Sch. Dist.*

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Tuition Reimbursement (II)

- *E.T. v. Bd. of Educ.*
- *Eley v. District of Columbia*
- *A.G. v. District of Columbia*

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Compensatory Education

- *D.F. v. Collingswood Borough Bd. of Educ.*
- *B.H. v. West Clermont Bd. of Educ.*
- *Wilson v. District of Columbia*

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Regulatory Developments

- 34 C.F.R. Part 303 76 Fed. Reg. 60139 (Sept. 28, 2011, effective Oct. 28, 2011) (Infant and Toddler Program)
- 28 C.F.R. Part 35, 75 Fed. Reg. 56164 (Sept. 15, 2010, effective Mar. 15, 2011) (Nondiscrimination on the Basis of Disability in State and Local Government Services)

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IDEA CASE LAW UPDATE—March, 2013

Mark C. Weber

Child Find

D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. October 11, 2012) (in case in which child exhibited serious behavior problems and some organizational difficulties from first year of kindergarten in fall of 2003 through second grade in 2006-07, was given cognitive and behavior assessment near end of first grade but found not in need of special education, saw private therapist in second grade who said that child needed special education placement, then after parents requested comprehensive evaluation and obtained outside evaluation at beginning of third grade year (2007-08), school offered IEP on November 30, 2007, and filed due process hearing request on January 8, 2008 while IEP was being finalized, holding that limitations barred relief for any conduct before January 8, 2006, reasoning that exceptions did not apply in absence of misrepresentation akin to intent deceit or egregious misstatement, or failure to provide statutorily mandated disclosures that caused failure to file timely complaint; rejecting equitable tolling argument; further denying compensatory education for conduct within limitations period, reasoning that district did not violate child find obligations in light of behavior deemed not atypical during early primary school years when report cards and conference forms indicated intermittent progress and academic success in several areas; stating that functional behavioral assessment was not required; further ruling that child was not denied appropriate education when he demonstrated educational success and received accommodations)

Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. May 17, 2012) (affirming district court's reversal of hearing officer determination that district committed child find violation and child was denied appropriate education in first grade when teacher postponed meeting early in school year, and re-evaluation in mid-year led to determination child was eligible under IDEA; noting that evaluations indicated that in kindergarten child had cognitive functioning and academic skills within normal ranges)

M.B. v. Hamilton Se. Schs., 668 F.3d 851 (7th Cir. Dec. 22, 2011) (in case involving young child with traumatic brain injury, holding that district satisfied child-find obligations by meeting state law timeline for evaluation within 60 instructional days of receiving parental consent)

M.J.C. v. Special Sch. Dist. No. 1, No. 10-4861 (JRT/TNL), 2012 WL 1538339 (D. Minn. Mar. 30, 2012) (concluding that district failed to comply with its child find responsibilities when it failed to propose needed evaluations in writing and fully evaluate child and for more than one school year; holding that district is not permitted to shift responsibility for obtaining physician's diagnosis to parent and should have arranged medical evaluation of child suspected of other health impairment if needed; further stating that district could not rely on oral expressions of reluctance on part of parent to allow testing for emotional disturbance when written proposal was not made and parent

did accept written proposal when it was made; finding that IEP finally provided was sufficient to confer appropriate education; remanding to hearing officer for determination of compensatory education, noting that compensatory time may exceed period of statute of limitations)

Evaluation

R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. Dec. 7, 2012) (in case of essentially non-verbal child with autism and intellectual disability, holding that when results of assistive technology assessment due to be completed by October 1, 2008 were not presented until May, 2009 meeting, IEP was not sufficiently individualized, but because child made continual progress with existing PECS communication system over course of year and received positive academic and non-academic benefits when using system, she received appropriate education; further holding that child, who was well-behaved, did not require functional behavioral assessment when her behavior intervention plan was based on observations, record review, and data analysis)

D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. October 11, 2012) (in case in which child exhibited serious behavior problems and some organizational difficulties from first year of kindergarten in fall of 2003 through second grade in 2006-07, was given cognitive and behavior assessment near end of first grade but found not in need of special education, saw private therapist in second grade who said that child needed special education placement, then after parents requested comprehensive evaluation and obtained outside evaluation at beginning of third grade year (2007-08), school offered IEP on November 30, 2007, and filed due process hearing request on January 8, 2008 while IEP was being finalized, holding that limitations barred relief for any conduct before January 8, 2006, reasoning that exceptions did not apply in absence of misrepresentation akin to intent deceit or egregious misstatement, or failure to provide statutorily mandated disclosures that caused failure to file timely complaint; rejecting equitable tolling argument; further denying compensatory education for conduct within limitations period, reasoning that district did not violate child find obligations in light of behavior deemed not atypical during early primary school years when report cards and conference forms indicated intermittent progress and academic success in several areas; stating that functional behavioral assessment was not required; further ruling that child was not denied appropriate education when he demonstrated educational success and received accommodations)

G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258 (11th Cir. Jan. 31, 2012) (holding that when parents attached excessive conditions to their consent to triennial reevaluation, including district's agreement not to use reevaluation in litigation, who was to conduct interview, presence of parents, and whether parents received information before district did, parents effectively did not provide consent)

E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999 (9th Cir. July 14, 2011) (applying California's then-current standard for specific learning disability, concluding that student established he had disorder in basic psychological process in form of auditory processing

disorder; ruling that court should have admitted evidence of evaluation conducted after due process hearing; holding that court should also consider subsequent evaluation by district finding child eligible; remanded for determination whether school district met obligation to locate, identify, and evaluate child as child with other health impairment or specific learning disability related to auditory processing disorder), *on remand*, No. C-06-4694 MMC, 2012 WL 909514 (N.D. Cal. Mar. 16, 2012) (affirming ALJ's determination that child did not have specific learning disability despite auditory processing disorder; applying state regulation defining severe discrepancy in intellectual ability and achievements to be at least 22.5 points adjusted by four-point standard error of measurement; holding that district reasonably relied on WISC-III score failing to show discrepancy that large, rather than Kaufman Assessment Battery for Children (K-ABC), which showed large discrepancy; further holding that child's auditory processing disorder did not qualify as other health impairment, and that other health impairment does not include one or more disorder considered under specific learning disability category)

Response to Intervention (RTI)

Michael P. v. Department of Educ., 656 F.3d 1057 (9th Cir. Sept. 8, 2011) (in case of child who was 2.4 grade levels behind in reading by middle of fourth grade, reversing district court decision affirming hearing officer's conclusion that child was not eligible for services under IDEA on ground that child could not demonstrate severe discrepancy between actual achievement and intellectual capacity; holding that states are prohibited from requiring exclusive reliance on severe discrepancy model to determine if child is eligible under specific learning disability, and that Hawaii's operation of unitary school system did not permit it to continue to operate under state regulation, later changed, that required use of severe discrepancy model and did not permit use of response to intervention model; remanding to district court to determine if child would be eligible under changed regulation)

State Directors of Special Education, 56 IDELR 50 (OSEP Jan. 21, 2011) (stating, "The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§ 300.304-300.311, to a child suspected of having a disability under 34 CFR § 300.8. . . . It would be inconsistent with the evaluation provisions at 34 CFR §§ 300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.")

Zirkel, 56 IDELR 140 (OSEP Jan. 6, 2011) (stating that school district using RTI to evaluate children suspected of having learning disabilities need not use RTI for parentally placed private school children within its jurisdiction; also stating that school districts may not use any single measure or assessment, including RTI, as sole criterion for determining whether children are children with disabilities under IDEA and for determining appropriate educational programs; further stating that observation requirement of 34 C.F.R. § 300.310(a) stands as separate requirement and is not intended to describe RTI model; additionally stating that IDEA and regulations do not prohibit

school districts from using data gathered through RTI process or model in identifying disabilities other than learning disabilities)

Independent Evaluation

Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691 (11th Cir. Nov. 21, 2012) (holding that 34 C.F.R. § 300.502 requiring independent educational evaluation at public expense is valid exercise of rule-making power by Secretary of Education despite fact that statutory provision regarding independent evaluation does not specify it must be at public expense; noting multiple reauthorizations of IDEA by Congress following issuance of regulation and noting deference to due to administrative agency; affirming reimbursement order)

G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258, 1266 (11th Cir. Jan. 31, 2012) (stating with respect to request for independent evaluation at public expense, "The district court correctly determined that the statutory provisions for a publicly funded independent educational evaluation never kicked in because no reevaluation ever occurred. The right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree."; further holding that any procedural failure did not affect education of child to substantive degree)

J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska Sept. 16, 2011) (when parents requested evaluation of child but district did not act within 45 school days and then obtained evaluation for child who was also receiving private tutoring arranged by parents, and ultimately child was found not eligible for special education, affirming order that parents be reimbursed for independent evaluation; reasoning that right to independent evaluation at public expense is not conditioned on eligibility, noting that district made use of private evaluation, and stating that parents are entitled to remedy)

Eligibility Under IDEA

Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996 (8th Cir. June 17, 2011) (affirming decision of district court, which reversed hearing panel's order of reimbursement for private placement; reasoning that even if IEP did not specifically identify child as having autism, program was reasonably calculated to enable child to receive educational benefits and affirming district court determination that school district afforded parents opportunity to work with team and provided all material information to parents)

Hansen v. Republic R-III Sch. Dist., 632 F.3d 1024 (8th Cir. Jan. 21, 2011) (in case of student diagnosed with conduct disorder, bipolar disorder, and ADHD who had been suspended frequently for threatening students and teachers, had made suicidal comments, whom district determined not to be eligible in decision that hearing officer upheld after district made motion for directed verdict at close of parent's case without submitting evidence of its own, affirming district court decision finding child IDEA-eligible under emotional disturbance category on strength of evidence of inability to maintain interpersonal relationships and poor performance in class and on standardized tests;

rejecting argument that child was merely socially maladjusted; also affirming decision finding child eligible under other health impaired category, noting evidence of adverse effect on educational performance and pointing out improvement in performance after taking medication for ADHD)

IEP Process, Implementation, and Related Issues

R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. Dec. 7, 2012) (holding that school district did not deny child appropriate education by occasionally ending meetings early due to parent's behavior when district promptly scheduled follow-up meetings at times parent could attend and facts indicated cool-off periods were warranted; finding no predetermination by school district of educational decisions)

R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. Sept. 20, 2012) (in three cases decided together involving children with autism, ruling that evidence should not be admitted to show adequacy of services when those services are not provided for in IEP, though testimony many explain or justify services provided for in IEP; emphasizing need for parents to rely on IEP document itself; stating that deficiencies in IEP might be remedied during resolution meeting period, but not afterward; holding that parents may use retrospective evidence to support the adequacy of a unilateral placement)

Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1051 (9th Cir. July 19, 2012) (in case of high-functioning child with autism and other disabilities, holding that school district deprived child of appropriate education by relying on outdated IEP, which district did not revise due to parental disagreement and pendency of four due process complaints; awarding partial reimbursement and remanding for consideration of additional reimbursement; stating: "The Individuals with Disabilities Education Act ("IDEA") mandates that public educational agencies review and revise annually an eligible child's IEP. Neither the IDEA nor its implementing regulations condition this—or any other—duty expressly imposed on a state or local educational agency upon parental cooperation or acquiescence in the agency's preferred course of action. Penalizing M.P.'s parents—and consequently M.P.—for exercising the very rights conferred by the IDEA undermines the statute's fundamental purposes.")

M.H. v. New York City Dep't of Educ., 685 F.3d 217 (2d Cir. June 29, 2012) (in one of two cases decided together, affirming determination of district court that IEP for child with autism was not adequate in that annual goals were those for first grader when child was entering kindergarten, and were not based on child's actual needs but on expected grade level, further that short-term objectives, particularly academic objectives, lacked measurement, and many were unattainable; in case of second child with autism, stating that photocopying of goals from prior IEP was "disturbing" (p. 256), but finding no violation on ground that no evidence established that goals were no longer appropriate; observing little evidence that district predetermined program)

Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. May 17, 2012) (finding that any deficiency in listing of instructional services in IEP did not deny educational opportunity

and that IEP containing Project Read program was adequately based on peer-reviewed research)

T.B. v. St. Joseph Sch. Dist., 677 F.3d 844 (8th Cir. Apr. 27, 2012) (upholding affirmance of hearing officer decision denying tuition reimbursement when parents withdrew child from public school and placed him at private school, even though events later in school year were alleged to have rendered district's previous IEP not appropriate and need for private school clear; reasoning that parent never requested school district to reevaluate child or informed district of intent to re-enroll child in public school, and that district was no longer under obligation to update IEP once child was withdrawn)

K.D. v. Department of Educ., 665 F.3d 1110 (9th Cir. Dec. 27, 2011) (upholding IEPs on merits, concluding that placement was not predetermined, parent was afforded opportunities to raise concerns over meeting dates, services offered met need for one-on-one skill trainer, goals and assessments were sufficient, and actual placement was adequately specified on IEP and appropriate)

Park Hill Sch. Dist. v. Dass, 655 F.3d 762 (8th Cir. Sept. 9, 2011) (in case of twins with autism, finding that administrative panel committed error of law in finding that absence of transition services and behavior interventions in IEP rose to level of substantive error in reimbursement case when parents did not give school district opportunity to implement IEP; further holding that panel erred in failing to consider transition plan formulated after IEP but before beginning of school year; further rejecting panel's holding that lack of behavior intervention plan compromised right to appropriate education when district personnel testified that they planned to use teaching methods and strategies that had worked with other children with autism and if that proved unsuccessful would conduct functional behavioral assessment and develop individualized behavior intervention plan)

Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478 (4th Cir. Apr. 27, 2011) (in case of child with moderate to severe autism, affirming district court's conclusion that school denied child appropriate education by material failure to implement IEP—providing 7.5 to 10 hours per week of ABA therapy without use of proper techniques rather than 15 hours called for in IEP—even though child made small improvements in tested areas)

Coventry Pub. Schs. v. Rachel J., No. CA 11-259-M. 2012 WL 4472116 (D.R.I. Sept. 28, 2012) (in case of student with ADHD, oppositional defiance disorder, and severe behavior disorder, holding that failure to provide clear behavior goals in IEP denied appropriate education even though student's grades were at time acceptable, noting that IEP must provide for all of child's special needs, not just academic needs, and that behavioral disability hampered academic achievement and prevented educational benefit; finding reimbursement for private residential school to be proper)

Eley v. District of Columbia, No. CIV.A. 11-309 BAH, 2012 WL 3656471 (D.D.C. Aug. 24, 2012) (adopting magistrate judge recommendation) (in case of child with non-verbal learning disability, cerebral palsy, impaired motor skills and adjustment disorder, holding that failure of school system to identify school child would attend after matriculating out

of charter school, from August 23, 2010 beginning of school year to October 7, 2010, during which period parent obtained private school services, holding that not updating IEP and then placing child in new school without input from parent called for reimbursement of parent even though parent did not provide formal notice of intent to enroll in private school, when parent had already requested due process hearing over failure to offer placement; remanding to hearing officer to determine reasonableness of amount)

West Virginia Schs. for the Deaf & Blind v. A.V., No. 3:11-CV-38, 2012 WL 1677939 (N.D. W. Va. May 14, 2012) (in case of nine-year-old with speech apraxia, global developmental delays and other disabilities, but no significant hearing loss, who was being served at state school but as a result of monitoring was to be exited for not meeting eligibility criteria for hearing or visual impairment, affirming hearing officer decision that child be permitted to remain at state school where she received total communication environment in class with four other students or fewer, rather than moved to home county school district where speech therapist would work with her 60 minutes per week and total communication environment could be provided for only small portion of school day; noting that proposed IEP was inconsistent in calling for general education 96% of time while also calling for full-time placement in self-contained setting, concluding that IEP was created to facilitate removal from state school rather than to meet child's needs; further holding that state law was preempted by IDEA to extent that it would prevent placement of child without hearing impairment in state school when need for total communication environment could not be met at local school)

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio Apr. 26, 2011) (ruling that school district failed to consider independent evaluations showing need for speech services and predetermined that child did not need speech services, that it failed to consider evaluation indicating need for occupational therapy services, that it failed to give notice of refusal to consider outside evaluations, and that parent's signature on IEP did not establish that she agreed with IEP; upholding hearing officer determination that failures denied appropriate education and meaningful participation and reversing review officer decision; further ruling that behavior interventions provided in IEP lacked any scientific basis, in violation of requirement that services be based on peer-reviewed research to extent practicable, citing Ohio Administrative Code)

Wilson v. District of Columbia, 770 F. Supp. 2d 270 (D.D.C. Mar. 18, 2011) (in case involving failure to provide transportation and resulting inability of child with multiple disabilities to attend four-week summer program provided for in IEP, holding that failure to demonstrate educational harm is not necessary to establish IDEA claim when material failure to implement IEP occurred; remanding for compensatory education remedy)

Parental Consent and Related Issues

G.J. v. Muscogee Cnty. Sch. Dist., 668 F.3d 1258 (11th Cir. Jan. 31, 2012) (holding that when parents attached excessive conditions to their consent to triennial reevaluation, including district's agreement not to use reevaluation in litigation, who was to conduct

interview, presence of parents, and whether parents received information before district did, parents effectively did not provide consent)

M.J.C. v. Special Sch. Dist. No. 1, No. 10-4861 (JRT/TNL), 2012 WL 1538339 (D. Minn. Mar. 30, 2012) (reversing decision of hearing officer and concluding that district failed to comply with its child find responsibilities; stating that district could not rely on oral expressions of reluctance on part of parent to allow testing for emotional disturbance when written proposal was not made and parent did accept written proposal when it was made)

Appropriate Education Issues in General

Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. Aug. 6, 2012) (finding that school district sufficiently individualized child's educational program by permitting accommodations; stating that overall educational benefit, rather than solely remediation of disability, is decisive under *Rowley*, and that IEPs were sufficient because they were reasonably calculated to enable child to achieve passing marks and advance from grade to grade, and child received academic benefit), *petition for cert. filed*, 81 U.S.L.W. 3421 (U.S. Jan. 14, 2013) (No. 12-875)

D.B. v. Esposito, 675 F.3d 26 (1st Cir. Mar. 23, 2012) (affirming district court decision affirming determination of hearing officer that fifteen-year-old child with severe developmental disabilities was offered appropriate education by district's proposed IEP; reasoning that determination of child's potential does not always need to precede determination that child's IEP complies with IDEA, and finding no clear error in district judge's determination that child's potential was unknowable; affirming determination that meaningful advancement under prior IEPs with services contested IEP kept in place supported conclusion IEP was appropriate)

K.E. v. Independent Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. Aug. 3, 2011) (affirming district court decision overturning ALJ decision that had found denial of appropriate education; concluding that school district considered results of outside evaluations obtained by parent, that IEPs adequately addressed child's deficits in organizational skills, that child made progress in areas of reading, spelling, and math despite failure to meet some IEP goals, and that child received required level of educational benefit; dissenting opinion by Bye, J., disagreeing with affording deference to district court's factual findings and concluding record established denial of appropriate education)

C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 991 (8th Cir. Apr. 21, 2011) (upholding decisions of hearing officer and district court that although child made progress in reading over relevant two school years, education offered was not appropriate when gap between student and peers increased each year, and in sixth grade student was reading at first grade level despite average intellectual ability, positive attitude, and willingness to work; overturning district court's denial of tuition reimbursement even though private school had no students without disabilities, and ruling that "a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the Act.")

West Virginia Schs. for the Deaf & Blind v. A.V., No. 3:11-CV-38, 2012 WL 1677939 (N.D. W. Va. May 14, 2012) (in case of nine-year-old with speech apraxia, global developmental delays and other disabilities, but no significant hearing loss, who was being served at state school but as a result of monitoring was to be exited for not meeting eligibility criteria for hearing or visual impairment, affirming hearing officer decision that child be permitted to remain at state school where she received total communication environment in class with four other students or fewer rather than moved to home county school district where speech therapist would work with her 60 minutes per week and total communication environment could be provided for only small portion of school day)

S.F. v. McKinney Indep. Sch. Dist., No. 4:10-CV-323-RAS-DDB, 2012 WL 718589 (E.D. Tex. Mar. 6, 2012) (magistrate judge recommendation) (in case of student with autism, deafness, and speech impairment, holding IEP not to be appropriate when it failed to address toileting goal and did not provide for placement with peers fluent in signing for more than hour per day; further finding behavior intervention plan not appropriate when it included compliance with student code of conduct child could not fully understand; requiring extended school year services), *adopted*, 2012 WL 1081064 (E.D. Tex. Mar. 30, 2012)

K.M. v. Tustin Unified Sch. Dist., No. SACV 10–1011 DOC (MLGx) (C.D. Cal. July 5, 2011) (upholding refusal to provide CART services to deaf high schooler, relying on *Rowley* standard and absence of evidence of necessity in light of success of other accommodations; also rejecting ADA and section 504 claims on ground that IDEA claim failed), *appeal docketed*, No. 11-56259 (9th Cir. July 26, 2011)

Independent Sch. Dist. No. 12, Centennial v. Minnesota Dep't of Educ., 788 N.W.2d 907 (Minn. Oct. 7, 2010) (in case of child with autism and Tourette's Syndrome who had strong sensory needs and need for motor breaks to move around classroom, holding that extracurricular and nonacademic activities to be included in IEP are not only those required for education of student with disabilities, relying on IDEA regulations providing for equal opportunity for participation in extracurricular and nonacademic activities and for participation with nondisabled students to maximum extent appropriate but not limiting activities to those necessary to provide appropriate education), *cert. denied*, 131 S. Ct. 1556 (2011)

Residential Placement

Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227 (10th Cir. Dec. 28, 2012) (in case in which parents unilaterally placed child in residential setting, affirming reimbursement award, noting that district did not deny that it failed to provide appropriate education, that facility was accredited secondary school with specialized instruction, that facility provided specially designed instruction to meet unique needs of child, and that additional services could be characterized as related services; comparing approaches of various circuits in residential placement cases and rejecting use of test asking if placement is primarily oriented toward enabling child to obtain education; further holding that reimbursement would not be reduced when parents complied with notice provision

and district's communications concerning evaluation failed to meet statutory notice requirements)

J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. Nov. 18, 2011) (in case of child with emotional disturbance who manifested deteriorating performance and suicide risk during high school, affirming determination that district failed to show that private school proposed by district could implement IEP; affirming determination that residential placement chosen by parents was appropriate; finding that failure of parents to provide notice before withdrawal of child, reluctance to consider alternative placements, and failure to produce child for interview with district's proposed placement justified decrease of tuition reimbursement by 75%)

Autism Programs and Applied Behavior Analysis

R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. Sept. 20, 2012) (in one of three cases decided together involving children with autism, finding that evidence supported 1:1 instruction but not necessarily by teacher rather than aide; in second case, finding that child needed ABA services not offered in IEP, and finding significant procedural error in failing to provide FBA and BIP; in third case, rejecting claim based on prediction school would not implement IEP)

M.H. v. New York City Dep't of Educ., 685 F.3d 217, 252 (2d Cir. June 29, 2012) (in one of two cases decided together, holding that district court properly reversed state review officer decision that failed to account for expert testimony that child with autism needed intensive 1:1 instruction, stating, "Although courts should generally defer to the state administrative hearing officers concerning matters of methodology, the SRO's failure to consider any of the evidence regarding the ABA methodology and its propriety for P.H. is more than an error in the analysis of proper educational methodology. It is a failure to consider highly significant evidence in the record. This is precisely the type of determination to which courts need not defer, particularly when the evidence has been carefully considered and found persuasive by an IHO."; determining that private autism center chosen by parents was appropriate and likely offered more mainstreaming opportunities than public school placement; in second case observing little evidence that district predetermined program; deferring to hearing officers in concluding that proposed ratio of six students to one teacher and one aide met child's needs)

K.D. v. Department of Educ., 665 F.3d 1110 (9th Cir. Dec. 27, 2011) (upholding 2007 and 2008 IEPs on merits, concluding that placement for child with moderate to severe autism was not predetermined, parent was afforded opportunities to raise concerns over meeting dates, services offered met need for on-on-one skill trainer, goals and assessments were sufficient, and actual placement was adequately specified on IEP and appropriate)

Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996 (8th Cir. June 17, 2011) (affirming decision of district court, which reversed hearing panel's order of reimbursement for private placement; reasoning that even if IEP did not specifically identify child as having

autism, program was reasonably calculated to enable child to receive educational benefits)

Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478 (4th Cir. Apr. 27, 2011) (in case of child with moderate to severe autism, affirming district court's conclusion that school denied child appropriate education by material failure to implement IEP; further upholding ruling that school could not provide appropriate education as of time of child's removal by parents; also holding that parental placement's restrictiveness is relevant factor to its appropriateness but that parental placements should not be considered inappropriate simply because they do not meet least-restrictive-environment requirement)

P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90 (E.D.N.Y. Aug. 15, 2011) (reversing decision of state review officer and ruling that termination of one-on-one speech therapy and ABA therapy deprived kindergarten child with autism of appropriate education; further ruling that private placement was appropriate and tuition should be paid directly to private placement)

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio Apr. 26, 2011) (upholding hearing officer's award of two years of services from agency employing ABA techniques in light of two years of inappropriate behavioral interventions in public school placement, which led to child's behavioral regression)

No Child Left Behind (NCLB)

M.M. v. Lafayette Sch. Dist., Nos. CV 09-4624, 10-04223 SI, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (holding that IDEA IEP requirements do not incorporate No Child Left Behind Act standards)

Personnel Qualifications

M.M. v. Lafayette Sch. Dist., Nos. CV 09-4624, 10-04223 SI, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (finding that under California law, school psychologist intern with internship pupil personnel services credential may conduct psychoeducational assessment for district under close supervision of experienced school psychologist; determining that school district's assessment was adequate)

Peer Harassment and Bullying

T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. Apr. 25, 2011) (denying defendant's motion for summary judgment in case in which parents alleged that program for child with learning disability failed to address persistent and severe bullying by classmate despite parents' repeated attempts to have school address problem, synthesizing authorities to establish rule that IDEA violation occurs when bullying is likely to affect child's opportunity for appropriate education and school fails to take appropriate steps to prevent it, even if bullying is not due to child's specific disability)

J.E. v. Boyertown Area Sch. Dist., 834 F. Supp. 2d 240 (E.D. Pa. Feb. 8, 2011) (affirming determination of hearing officer that placement of child with Asperger's Syndrome in autism support class at large public high school met appropriate education standard when parent contended, among other things, that placement would expose child to bullying, noting that history of bullying at other school did not support concern, and that program could effectively deal with any bullying that might occur and it would be impossible to show that no future bullying could ever occur), *aff'd*, 452 Fed. App'x 172 (3d Cir. Nov 21, 2011)

Related Services and Assistive Technology

R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. Dec. 7, 2012) (in case of essentially non-verbal child with autism and intellectual disability, holding that when results of assistive technology assessment due to be completed by October 1, 2008 were not presented until May, 2009 meeting, IEP was not sufficiently individualized, but because child made continual progress with existing PECS communication system over course of year and received positive academic and non-academic benefits when using system, she received appropriate education; further holding that child, who was well-behaved, did not require functional behavioral assessment when her behavior intervention plan was based on observations, record review, and data analysis)

Petit v. U.S. Dep't of Educ., 675 F.3d 769 (D.C. Cir. Apr. 13, 2012) (holding that federal regulation excluding mapping of cochlear implants from related services that districts must provide does not contradict IDEA, reasoning that mapping is not clearly part of audiology services and exclusion is reasonable interpretation, emphasizing expertise and cost required for mapping; further holding that exclusion of mapping does not violate 20 U.S.C. § 1406(b)(2) by lessening protections provided in 1983 regulations)
B.R. v. New York City Dep't of Educ., No. 11 Civ. 8433(JSR), 2012 WL 6691046 (S.D.N.Y. Dec. 26, 2012) (in case of nine-year-old with autism, holding that school department failed to prove that proposed public school placement could meet child's need for one-on-one occupational therapy identified by IEP team in light of evidence that at time of IEP, occupational therapy services were available only in group setting with six students; ordering reimbursement for private placement)

K.M. v. Tustin Unified Sch. Dist., No. SACV 10–1011 DOC (MLGx) (C.D. Cal. July 5, 2011) (upholding refusal to provide CART services to deaf high schooler, relying on *Rowley* standard and absence of evidence of necessity in light of success of other accommodations; also rejecting ADA and section 504 claims on ground that IDEA claim failed), *appeal docketed*, No. 11-56259 (9th Cir. July 26, 2011)

Least Restrictive Environment

M.M. v. District 0001 Lancaster Cnty. Sch., 702 F.3d 479 (8th Cir. Dec. 28, 2012) (holding that child with autism was provided appropriate education when despite failure to meet third grade math requirements and decline in reading scores there was evidence he would have advanced academically if he had remained in public school placement for

end of third grade and fourth grade; further holding that although outside experts found district's use of isolation in calming room to control aggressive behavior counterproductive when district's plan included strategies to address behavior problem and district relied on prior experience with calming room and rejected behavior strategies of outside expert that entailed possible restraint due to concerns over safety of child, other children, and staff; further ruling that public school placement was least restrictive setting although child spent much time in calming room and was offered only 45 minutes a day academic instruction in regular classroom but was educated with nondisabled students in parentally chosen private school; also holding that district met procedural requirements and permitted meaningful participation by parents, finding no predetermination)

Barron v. South Dakota Bd. of Regents, 655 F.3d 787 (8th Cir. Sept. 9, 2011) (affirming grant of summary judgment against parents of deaf and hearing impaired children claiming that closure of state school for deaf and discontinuation of its programs violated IDEA and due process rights; holding that parents did not need to exhaust claims because adequate relief was not available through administrative process; holding that despite parents' argument that least restrictive environment for deaf students is school of their own, IDEA calls for education with nondisabled children to maximum extent appropriate and makes no exception for deaf children; further holding that parents had not raised genuine issue of fact that children were provided appropriate education elsewhere; further holding that claims of inadequate notice were unsupported; rejecting constitutional claims)

Behavior Management Issues

M.M. v. District 0001 Lancaster Cnty. Sch., 702 F.3d 479 (8th Cir. Dec. 28, 2012) (holding that child with autism was provided appropriate education when despite failure to meet third grade math requirements and decline in reading scores there was evidence he would have advanced academically if he had remained in public school placement for end of third grade and fourth grade; further holding that although outside experts found district's use of isolation in calming room to control aggressive behavior counterproductive when district's plan included strategies to address behavior problem and district relied on prior experience with calming room and rejected behavior strategies of outside expert that entailed possible restraint due to concerns over safety of child, other children, and staff; further ruling that public school placement was least restrictive setting although child spent much time in calming room and was offered only 45 minutes a day academic instruction in regular classroom but was educated with nondisabled students in parentally chosen private school; also holding that district met procedural requirements and permitted meaningful participation by parents, finding no predetermination)

R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. Sept. 20, 2012) (in one of three cases decided together involving children with autism, finding that evidence supported 1:1 instruction but not necessarily by teacher rather than aide, and finding behavioral services adequate; in second case, finding that child needed ABA services not

offered in IEP, and finding significant procedural error in failing to provide FBA and BIP; in third case, rejecting claim based on prediction school would not implement IEP)

Bryant v. New York State Educ. Dep't, 692 F.3d 202 (2d Cir. Aug. 20, 2012) (affirming dismissal of case brought by parents of children at Judge Rotenberg Center challenging state regulations generally prohibiting use of aversives on New York students; also affirming denial of motion for preliminary injunction; reasoning that prohibiting one possible method of dealing with behavior disorders does not undermine right to individualized and appropriate education and is consistent with IDEA policies, and deferring to state's policy judgment regarding health and safety of its children), *petition for cert. filed*, 81 U.S.L.W. 3436 (Jan. 2, 2013) (No. 12-932)

Park Hill Sch. Dist. v. Dass, 655 F.3d 762 (8th Cir. Sept. 9, 2011) (in case of twins with autism, rejecting panel's holding that lack of behavior intervention plan compromised right to appropriate education when district personnel testified that they planned to use teaching methods and strategies that had worked with other children with autism and if that proved unsuccessful would conduct functional behavioral assessment and develop individualized behavior intervention plan)

S.F. v. McKinney Indep. Sch. Dist., No. 4:10-CV-323-RAS-DDB, 2012 WL 718589 (E.D. Tex. Mar. 6, 2012) (magistrate judge report and recommendation) (in case of student with autism, deafness, and speech impairment, finding behavior intervention plan not appropriate when it included compliance with student code of conduct child could not fully understand), *adopted*, 2012 WL 1081064 (E.D. Tex. Mar. 30, 2012)

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio Apr. 26, 2011) (ruling that behavior interventions provided in IEP lacked any scientific basis, in violation of requirement that services be based on peer-reviewed research to extent practicable, citing Ohio Administrative Code; further holding that point system was not appropriate when child did not understand it and it was inconsistently applied, that restraint was shown to be unnecessary given success at managing behavior at later placement without use of restraint, and that absence of negative impact on academic performance from school district's behavioral interventions was irrelevant when child's behavior regressed and district failed to implement appropriate positive behavioral interventions in violation of IDEA standards; awarding compensatory services)

Anonymous (OSEP Apr. 9, 2012) (stating that if district conducts functional behavioral analysis of individual child to determine whether child is eligible under IDEA and what nature and extent of special education and related services is needed by child, evaluation is subject to notice and parental consent requirements in 34 C.F.R. §§ 300.503-.504 and 300.300; in addition, when child with IEP transfers to school district in new state and district wishes to conduct evaluation while delivering comparable services to those on out-of-state IEP, evaluation is treated as initial evaluation)

Student Discipline

M.N. v. Rolla Pub. Sch. Dist. 31, No. 2:11-CV-04173-NKL, 2012 WL 2049818 (W.D. Mo. June 6, 2012) (holding that no change of placement because of violation of code of student conduct occurred when parent removed child for home schooling for two months, child's IEP was changed so he attended school for only half-days from December to April, school district moved child to alternative program, and child was suspended for less than ten days on several occasions; reasoning that home schooling was not district decision, that shortened day was not due to discipline but for educational purposes, that placement in alternative program in trailer on district campus when educational goals and needs were met in similar ways, and that suspensions either totaled 9.2 days and so did not were not change of placement or if counted differently did not constitute pattern)

Fisher v. Friendship Edison Pub. Charter Sch., No. 10-cv-886 (RCL), 2012 U.S. Dist. LEXIS 59510 (D.D.C. Jan. 26, 2012) (awarding full reimbursement of private school tuition when charter school suspended teen with ADHD for coming to school under influence of marijuana, multi-disciplinary team concluded that conduct was not manifestation of child's disability, child was expelled, but was not offered new placement, and parent was merely provided phone numbers for district public schools and public charter school board, and after attempts to find other schools parent enrolled child in private school), *reconsideration denied*, 2012 U.S. Dist. LEXIS 58538 (D.D.C. Apr. 26, 2012)

Settlement

J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436 (E.D. Pa. Dec. 14, 2011) (holding that hearing officers lack jurisdiction to enforce settlement agreements, even those reached at mediation or resolution session; also holding that hearing officer exceeded jurisdiction by interpreting settlement agreement to establish pendent placement in public school with support services; judicially enforcing settlement agreement with regard to its designation of current educational placement as being in public school despite settlement's placement of child in private school for one school year)

Due Process Hearing Requests

M.H. v. New York City Dep't of Educ., 685 F.3d 217 (2d Cir. June 29, 2012) (holding that when parents challenge substantive sufficiency of IEP and school district responds by arguing IEP placement was better because it used multiple methodologies, parents were not barred from contesting appropriateness of methodologies even though parents' due process complaint did not raise issue of teaching methodologies)

Due Process Hearing Limitations and Related Issues

D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. October 11, 2012) (in case in which child exhibited serious behavior problems and some organizational difficulties from first year of kindergarten in fall of 2003 through second grade in 2006-07, was given

cognitive and behavior assessment near end of first grade but found not in need of special education, saw private therapist in second grade who said that child needed special education placement, then after parents requested comprehensive evaluation and obtained outside evaluation at beginning of third grade year (2007-08), school offered IEP on November 30, 2007, and filed due process hearing request on January 8, 2008 while IEP was being finalized, holding that limitations barred relief for any conduct before January 8, 2006, reasoning that exceptions did not apply in absence of misrepresentation akin to intent deceit or egregious misstatement, or failure to provide statutorily mandated disclosures that caused failure to file timely complaint; rejecting equitable tolling argument; further denying compensatory education for conduct within limitations period, reasoning that district did not violate child find obligations in light of behavior deemed not atypical during early primary school years when report cards and conference forms indicated intermittent progress and academic success in several areas; stating that functional behavioral assessment was not required; further ruling that child was not denied appropriate education when he demonstrated educational success and received accommodations)

M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. June 6, 2012) (holding that appeal to district court of pre-hearing decision by hearing officer to dismiss claims arising before statute of limitations period, filed by parents while claims for later period were still pending for hearing, was premature and properly dismissed by district court; further holding that claim against state education department was properly dismissed when it was duplicative of claim in another pending case brought by parents; further holding that claim against state department of education for failure to supervise office of administrative hearings and hearing officers was properly dismissed, reasoning that judicial review of hearing officer decision provides adequate remedy and that authority of hearing officers does not extend to altering outcomes)

Scope of Due Process Hearing, Including Party Status

Goetz & Reilly, 57 IDELR 80 (OSEP Oct. 4, 2010) (stating that Minnesota law, as interpreted in Thompson v. Board of Special Sch. Dist. No. 1, 144 F..3d 574 (8th Cir. 1998) and other cases to deny parents right to file due process complaint against school district when child is no longer enrolled in that school district is inconsistent with IDEA and its regulations, which permit filing of due process complaint for any violation occurring within two years of time complaint is filed)

Conduct of Due Process Hearing

R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. Sept. 20, 2012) (in three cases decided together involving children with autism, ruling that evidence should not be admitted to show adequacy of services when those services are not provided for in IEP, though testimony many explain or justify services provided for in IEP; emphasizing need for parents to rely on IEP document itself; stating that deficiencies in IEP might be remedied during resolution meeting period, but not afterward; holding that parents may use retrospective evidence to support the adequacy of a unilateral placement)

Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79 (1st Cir. July 16, 2012) (deferring to determination of hearing officer with regard to comparative assessment of expert testimony in dispute over vocational training, social skills, and functional academics services afforded to 20-year-old with significant deficits in receptive language and other areas, and academic abilities ranging from first to third grade level)

Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction, 634 F.3d 1065 (9th Cir. Feb. 22, 2011) (dismissing for want of standing case filed by school district alleging that office of administrative hearings granted continuance of due process hearing without justification, reasoning that statutory private right of action applies only to children and parents, apart from ability to contest issues raised in due process complaint)

K.R. v. Missouri Dep't of Elementary and Secondary Educ., No. 2:11-CV-04042-DGK, 2011 WL 550077 (W.D. Mo., Feb. 9, 2011) (denying motion for temporary restraining order against two-day limit on amount of time permitted for presenting due process hearing case, stating that parent-plaintiffs failed to show immediate and irreparable injury in that they failed to specify when pending hearings would take place and remedy of new hearing with defendants' payment of attorneys' fees would suffice), *preliminary injunction denied and case dismissed*, 2011 WL 2560486 (W.D. Mo. Jun. 28, 2011) (relying on *Younger* abstention principles)

Hearing Officer Impartiality and Qualifications

M.N. v. Rolla Pub. Sch. Dist. 31, No. 2:11-CV-04173-NKL, 2012 WL 2049818 (W.D. Mo. June 6, 2012) (stating that hearing officers are presumed to be unbiased and party alleging bias has to produce sufficient evidence to overcome presumption; finding no bias on basis of hearing record)

R.K. v. New York City Dep't of Educ., No. 09-CV-4478 KAM, 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011) (rejecting parents' allegations of bias on part of state review officer premised on newspaper article, Internet search, statistical analysis of decisions, and fact of officer's cohabitation with attorney for state educational agency; ruling for parents on merits of case), *adopted*, 2011 WL 1131522 (E.D.N.Y. Mar 28, 2011), *aff'd*, 694 F.3d 167 (2d Cir. Sept. 20, 2012)

Finality of Due Process Hearing

Weiner, 57 IDELR 79 (OSEP Oct. 28, 2010) (stating that once final decision has been issued, no motion for reconsideration is permissible; states may allow motions for reconsideration prior to issuance of final decision, but final decision must be issued within 45-day timeline or properly extended timeline)

Judicial Jurisdiction

Knight v. Washington Sch. Dist., 416 F. App'x 594 (8th Cir. Apr. 27, 2011) (holding that action brought to appeal hearing officer's pre-hearing determination that due process complaint was insufficient was properly dismissed for lack of jurisdiction; holding dismissal should have been without prejudice) (unpublished op., not precedential)

Preclusion Issues

T.G. v. Baldwin Park Unified Sch. Dist., 443 F. App'x 273, 276 (9th Cir. July 15, 2011) (unpublished op.) (ruling that when placement offer for 2008-09 school year was before ALJ, decision did not preclude subsequent action over 2009-10 school year, even though remedy touched on 2009-10 school year, stating, "Each school year is a separate issue under the IDEA; whatever is deemed appropriate for one year cannot preclude dispute about the next.")

Mootness

D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488 (3d Cir. Sept. 12, 2012) (holding that claim for compensatory education is not mooted by family moving out of state; noting that courts have ordered school districts have been ordered to establish funds for compensatory services for children deprived of appropriate education, and courts may order school districts to pay new school district for services for child or contract with local provider near child's home), *on remand*, No. CIV.A. 10-594 JEI/JS, 2013 WL 103589 (D.N.J. Jan. 8, 2013) (denying plaintiffs' renewed motion for summary judgment)

E.D. v. Newburyport Pub. Schs., 654 F.3d 140 (1st Cir. Aug. 19, 2011) (Souter, J.) (holding that claim for reimbursement of tuition in private school incurred when school district allegedly failed to provide timely IEP was not mooted by parents' subsequent move from school district to Connecticut to be near school where parents had enrolled child because parents wanted to be near child and could not afford to maintain two residences; reasoning that advance tuition payments were due when they were still residents of district)

Gary G. v. El Paso Indep. Sch. Dist., 632 F.3d 201 (5th Cir. Jan. 31, 2011) (holding that under IDEA, case continues to present live controversy even though school district offers full relief in settlement offer if offer is not accepted)

M.N. v. Rolla Pub. Sch. Dist. 31, No. 2:11-CV-04173-NKL, 2012 WL 2049818 (W.D. Mo. June 6, 2012) (holding that case contesting failure to provide manifestation determination was not moot even though parent withdrew child from district following due process hearing decision, when parent claimed rights to contest imposition of discipline, to recover for compensatory educational services provided child by parent, and to have records expunged)

Prospective Relief

B.A. v. Missouri, No. 4:09CV1269 TIA, 2010 WL 1254655 (E.D. Mo. Mar. 24, 2010) (in case of child with severe disabilities attending state school who allegedly was subjected to verbal and physical abuse and neglect, and whose IEP was allegedly not implemented and who was otherwise allegedly denied appropriate education, denying motion to dismiss action seeking reversal of due process decision and order to install audio-visual monitoring of all classrooms and hallways, compensatory services and other relief; reasoning that allegations of past patterns of practice support claims for injunctive relief; holding that audio-visual monitoring may be proper relief if it assists in providing child with special education and related services)

Tuition Reimbursement Issues

Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227 (10th Cir. Dec. 28, 2012) (in case in which parents unilaterally placed child in residential setting, affirming reimbursement award, noting that district did not deny that it failed to provide appropriate education, that facility was accredited secondary school with specialized instruction, that facility provided specially designed instruction to meet unique needs of child, and that additional services could be characterized as related services; comparing approaches of various circuits in residential placement cases and rejecting use of test asking if placement is primarily oriented toward enabling child to obtain education; further holding that reimbursement would not be reduced when parents complied with notice provision and district's communications concerning evaluation failed to meet statutory notice requirements)

T.B. v. St. Joseph Sch. Dist., 677 F.3d 844 (8th Cir. Apr. 27, 2012) (upholding affirmance of hearing officer decision denying tuition reimbursement when parents withdrew child from public school and placed him at private school, even though events later in school year were alleged to have rendered district's previous IEP not appropriate and need for private school clear; reasoning that parent never requested school district to reevaluate child or informed district of intent to re-enroll child in public school, and that district was no longer under obligation to update IEP once child was withdrawn)

E.D. v. Newburyport Pub. Schs., 654 F.3d 140 (1st Cir. Aug. 19, 2011) (Souter, J.) (holding that claim for reimbursement of tuition in private school incurred when school district allegedly failed to provide timely IEP was not mooted by parents' subsequent move from school district to Connecticut to be near school where parents had enrolled child because parents wanted to be near child and could not afford to maintain two residences; reasoning that advance tuition payments were due when they were still residents of district)

Forest Grove Sch. Dist. v. T.A., 638 F.3d 1234 (9th Cir. Apr. 27, 2011), (applying abuse-of-discretion standard to district court decision, affirming district court's reversal of hearing officer decision and holding that tuition reimbursement should not be awarded when enrollment in private placement was undertaken for reasons other than conditions

of ADHD and depression, but instead for child's drug abuse and behavioral problems), *cert. denied*, 132 S. Ct. 1145 (Jan. 23, 2012)

Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478 (4th Cir. Apr. 27, 2011) (holding that parental placement's restrictiveness is relevant factor to its appropriateness but that parental placements should not be considered inappropriate simply because they do not meet least-restrictive-environment requirement)

C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 991 (8th Cir. Apr. 21, 2011) (upholding decisions of hearing officer and district court that although child made progress in reading over relevant two school years, education offered was not appropriate when gap between student and peers increased each year, and in sixth grade student was reading at first grade level despite average intellectual ability, positive attitude, and willingness to work; overturning district court's denial of tuition reimbursement even though private school had no students without disabilities, and ruling that "a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the Act.")

C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155 (9th Cir. March 28, 2011) (in case of child with autism and attention deficit disorder, affirming district court decision holding that in circumstances where school district failed to offer appropriate placement for child, full reimbursement for private placement would be awarded when private placement met some of child's needs and child received significant benefits in important areas, but placement did not meet all needs; rejecting argument that reimbursement should be reduced when parent cannot find or cannot afford program that meets all of child's needs), *cert. denied*, 132 S. Ct. 500 (2011)

E.T. v. Bd. of Educ., No. 11-CV-5510 ER, 2012 WL 5936537 (S.D.N.Y. Nov. 26, 2012) (remanding case to review officer when administrative decision, relying on parental placement of child in private school outside of district, rejected reimbursement claim but failed to consider whether district offered appropriate education to child, whether parental placement was appropriate, and whether equitable factors warranted reimbursement; reasoning that district of residency remained responsible for child, and that parental intent to place child in out-of-district setting did not negate school district's appropriate education obligation)

Coventry Pub. Schs. v. Rachel J., No. CA 11-259-M. 2012 WL 4472116 (D.R.I. Sept. 28, 2012) (in case of student with ADHD, oppositional defiance disorder, and severe behavior disorder, holding that failure to provide clear behavior goals in IEP denied appropriate education even though student's grades were at time acceptable, noting that IEP must provide for all of child's special needs, not just academic needs, and that behavioral disability hampered academic achievement and prevented educational benefit; finding reimbursement for private residential school to be proper)

Eley v. District of Columbia, No. CIV.A. 11-309 BAH, 2012 WL 3656471 (D.D.C. Aug. 24, 2012) (adopting magistrate judge recommendation) (in case of child with non-verbal learning disability, cerebral palsy, impaired motor skills and adjustment disorder, holding

that failure of school system to identify school child would attend after matriculating out of charter school, from August 23, 2010 beginning of school year to October 7, 2010, during which period parent obtained private school services, holding that not updating IEP and then placing child in new school without input from parent called for reimbursement of parent even though parent did not provide formal notice of intent to enroll in private school, when parent had already requested due process hearing over failure to offer placement; remanding to hearing officer to determine reasonableness of amount)

Reimbursement for Related Services

A.G. v. District of Columbia, 794 F. Supp. 2d 133 (D.D.C. July 1, 2011) (overturning hearing officer decision barring reimbursement for wraparound services including counseling, social work, psychological services, and parent counseling obtained when child was undergoing transition from residential placement but when school district did not provide IEP, and later provided IEP without needed services; agreeing with hearing officer's conclusion that parents did not need to place district on notice that they were obtaining and paying for private services, and holding that decision of hearing officer to deny reimbursement when parents failed to submit invoices or other evidence should be overturned in light of equitable considerations and ambiguities of hearing officer's statements; allowing submission of evidence of payments)

Compensatory Education

D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488 (3d Cir. Sept. 12, 2012) (holding that claim for compensatory education is not mooted by family moving out of state; noting that courts have ordered school districts have been ordered to establish funds for compensatory services for children deprived of appropriate education, and courts may order school districts to pay new school district for services for child or contract with a local provider near child's home), *on remand*, No. CIV.A. 10-594 JEI/JS, 2013 WL 103589 (D.N.J. Jan. 8, 2013) (denying plaintiffs' renewed motion for summary judgment)

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio Apr. 26, 2011) (upholding hearing officer's award of two years of services from agency employing ABA techniques in light of two years of inappropriate behavioral interventions in public school placement, which led to child's behavioral regression; rejecting least restrictive environment argument; also upholding award of two years of remedial speech and occupational therapies)

Wilson v. District of Columbia, 770 F. Supp. 2d 270 (D.D.C. Mar. 18, 2011) (in case involving failure to provide transportation and resulting inability of child with multiple disabilities to attend four-week summer program provided for in IEP, holding that failure to demonstrate educational harm is not necessary to establish IDEA claim when material failure to implement IEP occurred; remanding for compensatory education remedy)

Regulatory Developments

34 C.F.R. Part 303 76 Fed. Reg. 60139 (Sept. 28, 2011, effective Oct. 28, 2011) (Infant and Toddler Program)

28 C.F.R. Part 35, 75 Fed. Reg. 56164 (Sept. 15, 2010, effective Mar. 15, 2011) (Nondiscrimination on the Basis of Disability in State and Local Government Services)

"All Areas of Suspected Disability"

20 U.S.C. § 1414(b)(3)(B) (requiring assessment of children "in all areas of suspected disability'), (d)(1)(A)(i)(II) (requiring that IEPs contain measurable annual goals to "meet each of the child's . . . educational needs that result from the child's disability"), (d)(1)(A)(i)(IV)(aa) (requiring statement of special education and related services to be provided for child "to advance appropriately toward attaining annual goals") (2006)

Board of Educ. v. Rowley, 458 U.S. 176 (1982) (rejecting claim for sign-language interpreter for child with severe hearing impairment who had FM hearing aid and excellent lip-reading skills; interpreting appropriate education to mean basic floor of opportunity and conferral of some educational benefit, but rejecting standard that would maximize child's potential commensurate with opportunities provided other children)

N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202 (9th Cir. 2008) (ruling that school district failed to fulfill procedural requirements to evaluate child in all areas of disability, depriving child of appropriate education, by not evaluating child for autism upon notice child might be autistic, but instead referring parents to child development center; holding parents entitled to costs of services incurred in relevant school year and associated attorneys' fees; further holding that school district did not violate IDEA by failing to provide child extended school year services; also stating that 1997 IDEA Amendments obligated schools to provide children with disabilities with meaningful benefit, which is more than some educational benefit as prescribed by Rowley case)

K.I. v. Montgomery Pub. Schs., 805 F. Supp. 2d 1283 (M.D. Ala. 2011) (in case of child with rare congenital condition characterized by multiple joint contractures, muscle weakness, and fibrosis as well as muscular dystrophy and restricted lung disorder, who is unable to speak or raise arms, uses wheelchair, needs tube feeding and needs periodic suctioning to prevent respiratory problems, holding that district did not conduct required comprehensive evaluation of child when it failed to make cognitive evaluation or assistive technology assessment, and that failure led to denial of appropriate education; further holding that without needed data, IEP was not appropriately designed)

Dracut Sch. Comm. v. Bureau of Special Educ. Appeals, 737 F. Supp. 2d 35 (D. Mass. 2010) (in case of child with Asperger's Syndrome and other disabilities, determining that vocational assessment was untimely because it was not applied to student's services until spring of senior year, nearly year after's parent's request, and was inadequate in that it failed to provide measurable goals in areas such as education, employment, and

independent living and failed to address pragmatic language deficits; further holding that IEPs were inadequate with respect to pragmatic language skills, vocational skills, and skills for independent living; ruling that child was ineligible for services after high school graduation, but that services would be ordered as compensatory services)

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011) (see above)

R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir. 2012) (see above)

Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012) (see above)

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000) (rejecting parents' IDEA claim even though portions of IEP were not fully implemented, when school district offered compensatory services to make up for implementation problem)

R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012) (see above)

D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. October 11, 2012) (see above)

Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994) (requiring placement of child with intellectual disability in full-time regular education program with help of part-time aide and other assistance)

Oberti v. Board of Educ. 995 F.2d 1204 (3d Cir. 1993) (requiring inclusion of child with Down Syndrome in general education classroom, noting that although mainstreaming had previously been unsuccessful, child had not been offered proper supplementary aids and services)

Mark C. Weber, *"All Areas of Suspected Disability,"* LOYOLA L. REV. (forthcoming 2013), http://ssrn.com/author=83733

"All Areas of Suspected Disability"

Mark C. Weber
DePaul University College of Law
March, 2013

Introduction

- All Areas and Each Need Requirements
- Recent Attention and Enforcement
- Possible Interpretations:
  - IDEA Enforcement Beyond *Rowley*
  - Adaptation to Inclusion
  - Reaction to Budget Cuts

IDEA Entitlements, Procedures, and Standards

- "Appropriate" Education, including Related Services
- Least Restrictive Environment, with Supplementary Aids and Services to Prevent Removal from Regular Education
- Procedural Protections
- *Board of Education v. Rowley*

Origins of the All Areas and Each Need Provisions

- 1997 IDEA Amendments
- Connection to Other Evaluation and IEP Requirements
- Concept of Breadth of Services

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Assessment in All Areas Cases

- *N.B. v. Hellgate Elementary School District*
- *K.I. v. Montgomery Public Schools*
- *Dracut School Committee v. Bureau of Special Education Appeals*
- Many Others

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Goals and Services for Each Need

- *B.H. v. West Clermont Board of Education*
- *R.E. v. New York City Department of Education*
- *Dracut School Committee v. Bureau of Special Education Appeals*
- Many Others

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Interpretation 1: IDEA Beyond *Rowley*

- Confronting *Rowley*
- *Klein Independent School District v. Hovem*
- Ensuring an Independent Meaning for the All Areas and Each Need Provisions
- Other Cases Seemingly Like *Klein* Aren't
  - *Houston Independent School District v. Bobby R.*
  - *R.P. v. Alamo Heights Independent School District*
  - *D.K. v. Abington School District*

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Interpretation 2: Inclusion

- Developments in 1990s
  - *Sacramento City Unified School District v. Rachel H.*
  - *Oberti v. Board of Education*
- Other Aspects of 1997 Amendments
- Increased Use of Mainstreaming over Time
- Recognition of Role of Aids and Services

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Interpretation 3: Reaction to Cutbacks

- The Great Recession
- The Not-So-Great Sequestration?

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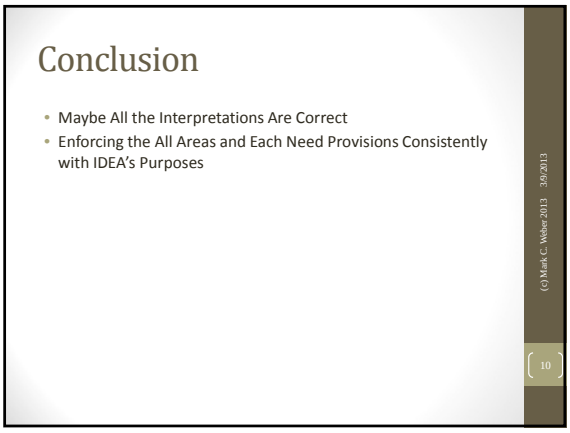
Conclusion
• Maybe All the Interpretations Are Correct
• Enforcing the All Areas and Each Need Provisions Consistently with IDEA's Purposes
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2013 Administrative Law Judge Training

Sponsor: Missouri Administrative Hearing Commission

March 26-27, 2013

Session	Time	Presenters	Topic
Tuesday, March 26			
1	8:30 - 10:00	S. James Rosenfeld	Introduction and Overview of IDEA
	10:00 – 10:15	Break	
2	10:15 – 12:30	Jose L. Martin	Dissecting Discipline
	12:30 - 1:15	Lunch	
3	1:15 - 3:00	Cynthia Herr, Ph.D.	Evaluations, Testing & IEPs
	3:00 -3:15	Break	
4	3:15 - 5:00	Cynthia Herr, Ph.D.	Evaluations, Testing & IEPs (continued)
Wednesday, March 27			
5	8:30 - 10:00	Mark C. Weber	Overview of Current IDEA Litigation
	10:00 – 10:15	Break	
6	10:15 – 12:30	Mark C. Weber	Focus: “All Areas of Suspected Disability”
	12:30 – 1:15	Lunch	
7	1:15 - 3:00	James D. Gerl	IDEA Pre-Hearing Conferences
	3:00 – 3:15	Break	
8	3:15 - 5:00	James D. Gerl	Conducting IDEA Hearings